Notes

Treble Damages and the Indirect Purchaser Problem: Considerations for a Congressional Overturning of *Illinois Brick*

The calculation of damages in a treble damage action brought pursuant to section 4 of the Clayton Act to redress an injury resulting from a violation of the antitrust laws causes the federal courts considerable difficulty. Prior to 1977, one of the most litigated issues had been whether any purchaser in a chain of manufacture or distribution not in privity with an alleged violator of the antitrust laws should be permitted to attempt to demonstrate that the overcharge resulting from the alleged violator's act was passed through the chain to that purchaser. The validity of this "offensive pass-on" theory was especially questioned after the United States Supreme Court's 1968 decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[1] In *Hanover Shoe*, the defendant manufacturer attempted to avoid liability to a direct purchaser by utilizing the pass-on theory in a defensive manner, arguing that the direct purchaser had passed on the overcharge to purchasers farther down the chain; the Supreme Court rejected the "defensive pass-on" theory as a matter of law. Nine years later, in *Illinois Brick Co. v. Illinois*,[2] the Supreme Court completed the circle and rejected the "offensive pass-on" theory when it construed the "injury" requirement in section 4 to preclude from maintaining an action those persons who had not dealt directly with a violator. The Court reasoned that litigation by purchasers throughout the chain would retard antitrust enforcement by injecting complicated damages issues into the section 4 action as well as by creating a serious risk that defendants would be subject to liability to one or more plaintiffs in a chain for the same overcharge.

Congressional criticism of *Illinois Brick* was swift;[3] bills to overturn the result were introduced in both the Senate and the House of Representatives within weeks after the decision.[4] Since then, the House Subcommittee on Monopolies and Commercial Law, the House Committee on the Judiciary, the Senate Subcommittee on Antitrust and Monopoly, and the

1. 392 U.S. 389 (1968).

2. 431 U.S. 720 (1977).

3. The decision was attacked by Senator Edward Kennedy and Congressman Peter H. Rodino the day after it was announced. Wall St. J., June 10, 1977, at 16, col. 1.

4. S. 1874, 95th Cong., 1st Sess. (1977), and H.R. 8359, 95th Cong., 1st Sess (1977), were introduced on July 15, 1977. *See* note 53 *infra.*

Senate Committee on the Judiciary have struggled to achieve a workable legislative resolution of the problems that constrained the Supreme Court from recognizing an indirect purchaser action.

This Note will articulate the principal areas of disagreement between the proponents and opponents of the *Illinois Brick* decision and will suggest how the major difficulties articulated by the Supreme Court majority can be resolved legislatively. Preliminarily, this Note will examine the concept of antitrust standing as well as analyze the standard of proof required to demonstrate injury under section 4. It will also demonstrate that the compensatory and deterrent functions of the treble damages provision would be enhanced by a rule providing judicial access to indirectly injured purchasers. Next, this Note will discuss the practical problems of drafting legislation to solve the concerns expressed by the Supreme Court in *Illinois Brick*. It will stress that the Congress must carefully consider the ramifications of permitting the indirect purchaser suit and the necessity of creating innovative procedures to answer the concerns of the Court. The Note will also outline the bills currently in the Congress and will indicate the extent to which they resolve the problems.

I. BACKGROUND

A. *The Cases*

Any congressional consideration of the indirect purchaser problem must acknowledge the two Supreme Court forays into the area. This Note begins, therefore, with a review of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[5] and *Illinois Brick Co. v. Illinois.*[6]

1. Hanover Shoe, Inc. v. United Shoe Machinery Corp.—*The Rejection of Defensive Pass-On*

Prior to 1968, the lower federal courts had treated the pass-on issue—whether asserted defensively to avoid liability to a particular plaintiff or offensively as a theory of recovery—as a factual matter.[7] *Hanover Shoe* provided the Supreme Court's first opportunity to examine pass-on. The question arose in that case as a defense to avoid liability to a direct purchaser[8] of an alleged monopolist's product. The defendant contended that the direct purchaser plaintiff had not been injured by the alleged violation because of its ability to pass on any overcharge to downstream purchasers.

5. 392 U.S. 481 (1968).

6. 431 U.S. 720 (1977).

7. *See* Pollack, *Automatic Treble Damages and the Passing-On Defense: The* Hanover Shoe *Decision*, 13 ANTITRUST BULL. 1183 (1968). *See, e.g.*, Miller Motors v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958); Wolfe v. National Lead Co., 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955).

8. The plaintiff in *Hanover Shoe* was actually a lessee of the defendant's products. Throughout this paper, the term "purchaser" will be used to describe the persons in the chain of manufacture or distribution, irrespective of the business arrangement among them or between them and the alleged violator.

The plaintiff, Hanover Shoe, was a manufacturer of shoes. It leased some of its larger machinery[9] from the defendant, United Shoe Machinery Corp.[10] Following a successful government civil suit against United in 1954 for the creation of a monopoly,[11] Hanover Shoe commenced a treble damage action against United. Hanover Shoe first charged that United's lease-only policy violated the attempt to monopolize portion of section 2 of the Sherman Act;[12] Hanover Shoe then claimed that had United sold rather than leased its machinery, Hanover Shoe would have paid less for the use of the machinery. United countered that, even assuming liability, Hanover Shoe had not been injured because it had passed on any overcharge to the ultimate purchasers of shoes across the United States.

The parties agreed to a separate trial to litigate the pass-on issue, since it might have been dispositive of the entire action. At that separate trial, the district court agreed with Hanover Shoe's theory of damages and rejected United's pass-on defense. The court wrote that a plaintiff "against whom a tort is committed has his cause of action at the moment that the tort occurs. . . . Things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant."[13] The Third Circuit affirmed the district court's "thoroughly convincing decision."[14] After a long trial on the merits, the Supreme Court granted certiorari. In a decision penned by Justice White and joined by six other justices,[15] the Court affirmed the earlier holdings of the lower courts and rejected the pass-on defense as a matter of law.[16] Applying the tort principle that "[t]he general tendency of

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9. The defendant utilized a lease-only policy with respect to the more complicated, and hence the more important, machinery. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 264 (M.D. Pa. 1965).

10. United had been in existence since 1899. *Id.* At the time of the trial, it supplied more than 75% of the nation's demand for shoe machinery; in addition, it retained contacts with 90% of all the shoe factories across the country. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 297 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

11. *Id.*

12. The sole support for the plaintiff's substantive theory was the prior decision in favor of the United States in the civil suit. 15 U.S.C. § 16(a) provides that a final judgment or decree in a civil or criminal proceeding brought by the United States may be used by a private party in its own subsequent action as prima facie evidence of the violation. 15 U.S.C. § 16(a) (1976).

13. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 185 F. Supp. 826, 829 (M.D. Pa. 1960), 281 F.2d 481 (3d Cir. 1960), *cert. denied*, 364 U.S. 901 (1960).

14. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 281 F.2d 481, 481 (3d Cir. 1960), *cert. denied*, 364 U.S. 901 (1960).

15. Justice Marshall did not participate. Justice Stewart dissented from the Court's finding that the illegality of the defendant's lease-only policy had been determined in the government's civil action and therefore did not consider the pass-on issue.

16. 392 U.S. at 494. The Court created an exception whenever the direct purchaser has a pre-existing "cost-plus" contract with an indirect purchaser. A cost-plus contract entitles the direct purchaser to receive from the indirect purchaser the price that the direct purchaser itself paid to the alleged violator ("cost") as well as a profit based on a percentage of that cost ("plus"). The cost-plus feature insures that any overcharge will be passed on to the indirect purchaser, thus alleviating the proof difficulties that would otherwise exist. *Cf.* note 50 *infra* (discussing the cost-plus exception to the Supreme Court's rejection of offensive pass-on in *Illinois Brick*).

the law, in regard to damages at least, is not to go beyond the first step,"[17] Justice White stated that "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of Section 4."[18]

The Court emphasized two reasons for its decision. First, it stressed the difficulty of proving a pass-on. This difficulty, when coupled with the likelihood that future defendants would invariably seek to establish the defense if it were permitted, would further increase the complexity of the treble damage action.[19] Second, the Court noted that at least one result of any recognition of the defense would be that the major burden of enforcing the antitrust laws would inevitably be placed on an indirect purchaser—here, the ultimate consumer of the shoes.[20] The Court commented that these indirect purchasers "would have only a tiny stake in a lawsuit and little interest in attempting a class action" and that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would want to bring suit against them."[21]

2. Illinois Brick Co. v. Illinois—*The Rejection of Offensive Pass-On.*

Questions arose after *Hanover Shoe* about the continued validity of indirect purchaser suits under section 4. *Hanover Shoe* presented two problems for courts faced with the assertion of offensive pass-on theories by indirect purchasers. Some courts noticed the potential for multiple liability.[22] Under the *Hanover Shoe* rule the direct purchaser is deemed for purposes of section 4 to have suffered the entire injury; what result if it recovers and, subsequently, an indirect purchaser attempts to bring suit for the same injury? Other courts pointed to the difficulty of demonstrating the amount of overcharge attributable to the defendant. These courts asserted that either as a matter of fact or as a matter of law the defendant

17. 392 U.S. at 490 n.8, (*citing* Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 530, 34 (1918) (*Per* Holmes, J.)).

18. 392 U.S. at 489.

19. *Id.* at 492-93. One commentator has likened this type of treatment to that generally associated with determining whether a certain type of conduct is a per se violation of the antitrust laws. McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under* Hanover Shoe, 33 U. PITT. L. REV. 177, 184 (1971).

20. 392 U.S. at 494.

21. *Id.* The Court's comment reflects the assumption that those shoe buyers had a cause of action in the first instance. As will be seen, this second rationale in *Hanover Shoe* runs counter to the Court's decision in *Illinois Brick* that the indirect purchaser never had a suit at all, since judicial recognition in 1977 that § 4 precluded indirect purchasers from bringing actions must, albeit fictionally, mean that the action never existed at all. Moreover, it contradicts what must have been one of the major concerns in *Illinois Brick*—that ultimate consumers everywhere would inundate the federal courts with claims about overpriced shoes, bread, eggs, and other consumer items. Since no consumers had asserted claims in *Hanover Shoe*, however, it may well be that this second argument is merely a makeweight, applicable only to the factual development in *Hanover Shoe*, and that attempts to reconcile *Hanover Shoe* and *Illinois Brick* on this point are fruitless.

22. *See, e.g.*, Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973),

did not "cause" the plaintiff's injury.[23] Despite these problems, numerous other courts were more solicitous of the indirect purchaser's action; they stressed that the congressional purposes for enacting the private treble damage action had been both to deter violations and to compensate the victims of violations that did occur.[24] These latter courts remained receptive to the attempts of the antitrust plaintiff to demonstrate the amount of loss claimed as a proximate result of a violator's conduct; available procedural mechanisms, they argued, adequately protected the defendant against any possible risks of multiple liability that existed as a result of the *Hanover Shoe* rule.

The eleven defendants in *Illinois Brick* were manufacturers, sellers, and distributors of concrete block in the Greater Chicago area.[25] Together, they constituted virtually the only source of supply for the product in that area. In April 1973, the United States indicted the eleven for an alleged combination and conspiracy to fix the price of concrete block; such price fixing would be an action in restraint of trade and thus violative of section 1[26] of the Sherman Act. Pleas of nolo contendere were entered in the criminal action.[27] In a companion civil suit brought by the government, a consent decree was obtained.[28]

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23. Philadelphia Hous. Auth. v. American Radiator and Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator and Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); City and County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971); Balmac, Inc. v. American Metal Prod. Corp., 1972 TRADE CAS. ¶ 74,235 (N.D. Cal. 1972); Travis v. Fairmount Foods Co., 346 F. Supp. 679 (E.D. Pa. 1972); City of Akron v. Laub Baking Co., 1972 TRADE CAS. ¶ 73,930 (N.D. Ohio 1972); Stern v. Lucy Webb Hayes Nat'l Training School for Deaconnesses and Missionaries, 367 F. Supp. 536 (D.D.C. 1973).

24. Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976) (dictum); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. of Cal. v. Alaska, 415 U.S. 919 (1974); Illinois v. Bristol Myers Co., 470 F.2d 1276 (D.C. Cir. 1972) (dictum); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); *In re* Sugar Indus. Antitrust Litigation, 1976-2 TRADE CAS. ¶ 61,215 (E.D. Pa. 1976); *In re* Toilet Seat Antitrust Litigation, 1976-1 TRADE CAS. ¶ 60,915 (E.D. Mich. 1976); *In re* Plywood Antitrust Litigation, 1976-1 TRADE CAS. ¶ 60,805 (E.D. La. 1976); Carnivale Bag v. Slide Rite Mfg. Corp., 1975-1 TRADE CAS. ¶ 60,370 (S.D.N.Y. 1975); Bray v. Safeway Stores, Inc., 1975-1 TRADE CAS. ¶ 60,193 (N.D. Cal. 1975); *In re* Gypsum Cases, 1974-2 TRADE CAS. ¶ 75,272 (N.D. Cal. 1974); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 1974-2 TRADE CAS. ¶ 75,200 (D. Md. 1974); *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. ¶ 74,680 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975); Bosches v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); Southern Gen. Builders, Inc. v. Maule Indus., Inc., 1973-1 TRADE CAS. ¶ 74,484 (S.D. Fla. 1972); *In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); California v. Frito-Lay, Inc., 333 F. Supp. 977 (C.D. Cal. 1971); City of Philadelphia v. American Oil Co., 1971 TRADE CAS. ¶ 73,625 (D.N.J. 1971); Utah v. American Pipe & Constr. Co., 1970 TRADE CAS. ¶ 73,033 (C.D. Cal. 1969).

25. Petitioner's Brief for Certiorari at 3, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Greater Chicago area was defined to include Boone, DeKalb, Grundy, Kankakee, Kendall, LaSalle, Lake, McHenry, Cook, Kane, DuPage and Will counties in Illinois, Lake and Porter counties in Indiana, and Kenosha county in Wisconsin. First Amended Complaint, Appendix to Petitioner's Brief for Certiorari at 9, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

26. Section 1 of the Sherman Act begins: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1976).

27. Respondents' Brief on the Merits at 2, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

28. *Id.*

Numerous civil treble damage actions swiftly followed the government suits; these actions were brought by masonry contractors, general contractors, and private builders, as well as the State of Illinois and 700 governmental entities.[29] The actions by the masonry contractors, general contractors, and private builders were settled without prejudice to the actions of the state.[30] The public plaintiffs sought to recover an alleged overcharge in the price of concrete block that had been used in public buildings purchased by the state.[31] The defendants moved for partial summary judgment based upon "the inadequacy of plaintiff's proof."[32] Particularly, they relied upon *Hanover Shoe*.

The district court rejected the argument that *Hanover Shoe* itself mandated dismissal of the indirect purchaser suit.[33] Mistakenly analyzing the issue as a problem of standing, however, the district court felt bound by an earlier Seventh Circuit decision that it read to endorse a restrictive test that denied standing to ultimate consumers.[34] Thus, the district court granted partial summary judgment under a different theory than that upon which the defendants had relied. On appeal the Seventh Circuit agreed with the district court that *Hanover Shoe* should not be read to preclude indirect purchaser suits. It disagreed, however, with the district court's reading of its earlier decision.[35] Relying instead on both the Supreme Court's test of standing in administrative law, *Association of Data Processing Service Organizations, Inc. v. Camp*,[36] and a traditional test of standing in antitrust, the target area test,[37] the Seventh Circuit ruled that the state had standing.[38] It held that the district court had misread the earlier Seventh Circuit decision:

> The error in defendants' reading of *Hanover Shoe, Mangano*, and *Commonwealth Edison* is that they view the failure to show that antitrust violations caused plaintiffs' injury as an element of standing. It is not. Rather, the question is one of fact, and any decision thereon is an adjudication on the merits.[39]

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29. Illinois v. Ampress Brick Co. 536 F.2d 1163, 1164 (7th Cir. 1976); *see* Petitioners' Brief for Certiorari at 3, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The local governmental entities consisted of counties, municipalities, housing authorities, and school districts. Appendix to Petitioners' Brief for Certiorari at 16-48, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

30. 536 F.2d at 1164.

31. *Id.* *See* Petitioner's Brief for Certiorari at 3, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The buildings had been constructed for the state pursuant to contracts awarded on the basis of competitive bidding to the same contractors who had previously settled.

32. Petitioners' Brief on the Merits at 4, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

33. Illinois v. Ampress Brick Co., 67 F.R.D. 461, 466 (N.D. Ill. 1975).

34. *Id.* at 467-68 (*citing* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963)).

35. 536 F.2d at 1166.

36. 397 U.S. 150 (1970).

37. *See* the discussion on the law of antitrust standing in Section III(A) *infra*.

38. 536 F.2d at 1166-67.

39. *Id.* at 1166.

The Supreme Court reversed, construing the injury requirement of section 4 to preclude indirect purchasers as a matter of law from maintaining treble damage actions. The Court declined to rest its decision on standing;[40] instead, it found *Hanover Shoe* controlling:

> [W]hatever rule is to be adopted regarding pass-on in antitrust damage actions, it must apply equally to plaintiffs and defendants. . . . [W]e decline to abandon the construction given § 4 in *Hanover Shoe*—that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of the section—in the absence of a convincing demonstration that the court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble damage action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.[41]

The *Illinois Brick* majority first considered the possibility of a one-sided application of *Hanover Shoe*—recognizing indirect purchaser suits but denying the pass-on defense.[42] It rejected this approach, however, as threatening serious risks of multiple liability.[43] The Court feared that a defendant who had been successfully sued by its direct purchaser would still face the risk of suit by any number of indirect purchasers in the chain, none of whom (unless they had previously joined with the direct purchaser) would be collaterally estopped.[44] Existing procedural mechanisms were inadequate, the majority felt, to eliminate this risk.[45]

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40. 431 U.S. at 728 n.7. Thus, the Court continued its reluctance to enter the standing area. *See* note 86 *infra*. It is suggested in Section IV(B) *infra* that the Court could have achieved a more equitable result had it recognized the usefulness of a standing theory to solve some of the problems in pass-on.

41. 431 U.S. at 728-29.

42. This approach had been adopted by those lower courts that allowed offensive pass-on after *Hanover Shoe*. *See* note 24 *supra*.

43. The majority stated:

> Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed-on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever.

431 U.S. at 730-31.

44. Two courts indicated that collateral estoppel would apply in such cases. Bosches v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. ¶ 74,680 at 94,979 (D. Conn. 1973). Collateral estoppel, however, can only be used against a party who has had a full and fair chance to litigate the particular issue. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). Thus, the *Illinois Brick* majority is correct.

45. 431 U.S. at 731 n.11, 737 n.18. Justice Brennan in dissent felt that an array of available procedural devices reduced this risk to an acceptable margin. 431 U.S. at 762-64. Other courts and

The majority next proceeded to consider whether the *Hanover Shoe* rule should be abrogated. Even conceding the possibility of joining all the claimants in one suit,[46] the Court felt that the result would be to

> transform treble-damage actions into massive multi-party litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damage actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen, whose representatives presumably should be joined. And in suits by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated.[47]

The difficulty that the Court had previously perceived in *Hanover Shoe* of proving a defensive pass-on "applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer."[48] The majority continued:

> Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passees). *If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product. Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities—the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. . . .
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> More important . . . , "in the real economic world rather than an economist's hypothetical model, the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.[49]

The Supreme Court therefore rejected the offensive pass-on theory[50] utilized by the State of Illinois.

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commentators have expressed similar opinions. *See, e.g., In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. ¶ 74,680 (D. Conn. 1973); McGuire, *supra* note 19, at 197-98. Significantly, no reported cases appear even remotely to have presented this threat. *See* Section IV(D) *infra* for a suggested solution to this problem.

46. The majority felt that joinder was compelled by FED. R. CIV. P. 19, which requires the joinder of persons needed for a just adjudication. 431 U.S. at 737-38.

47. 431 U.S. at 740-41.

48. *Id.* at 741. The wholesale adaptation of the *Hanover Shoe* reasoning to a case involving offensive pass-on is inappropriate since, unlike the defendant, the plaintiff must prove only that the illegal activity was a material (and not necessarily the sole) cause of the price increase. *See* note 97 *infra*. The *Illinois Brick* majority, however, saw no meaningful distinction between the quantum of proof required of the plaintiff attempting to prove a pass-on to itself and that required of the defendant who raises pass-on as an affirmative defense to escape liability

49. 431 U.S. at 741-42.

50. The Court apparently agreed that an exception would be made whenever a pre-existing cost-plus contract was concerned. *Cf.* note 16 *supra* (discussing the cost-plus exception to the Supreme Court's rejection of defensive pass-on in *Hanover Shoe*). Footnote 16 in the majority opinion indicated a further possible exception: "Another situation in which market forces have been super-

B. *The Pending Legislation*

The initial versions of S. 1874 and H.R. 11942,[51] the two bills to overturn *Illinois Brick*,[52] were introduced on July 15, 1977.[53] Each bill stated in pertinent part that sections 4, 4A, and 4C(a)(1) of the Clayton Act would be amended "by inserting 'in fact, directly or indirectly,' immediately after 'injured.' "[54] The two bills were quickly criticized, even by opponents of the *Illinois Brick* decision, for failing to address the concerns expressed by the Supreme Court.[55]

By September 1977, the Senate bill had already been significantly altered to attempt the more comprehensive task of overruling both *Illinois Brick* and *Hanover Shoe*.[56] The Senate Subcommittee on Antitrust and

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seded and the pass-on defense might be permitted is where the direct purchaser is controlled by its customer."

In Stotter & Co. v. Amstar Corp., 1978-1 TRADE CAS. ¶ 61,934 (3d Cir. 1978), the wholesaler plaintiff purchased candy directly from the defendant candy manufacturers, who were also refiners of the sugar used in the candy. The plaintiff alleged that the defendants were engaged in a conspiracy to fix the price of sugar; the inflated sugar price, the plaintiff further contended, resulted in an illegally high price for the candy. The defendants argued that the difficulties in determining damages when indirect purchasers were involved extended to the present situation: Since the cost of the price-fixed item was only a portion of the cost of the final product, the difficulties of tracing the various components that contribute to the price of a final product that were noted by the Supreme Court majority in *Illinois Brick*, also occurred here. The court rejected the defendants' position, stating that "to deny recovery in this instance would leave a gaping hole in the administration of the antitrust laws. It would allow the price-fixer of a basic commodity to escape the reach of a treble-damage penalty simply by incorporating the tainted element into another product." 1978-1 TRADE CAS. at 73,953.

Some commentators and practitioners have argued that future antitrust plaintiffs will attempt to fit various factual patterns into the "cost-plus" or the "control" exception. *See* Note, *Antitrust Law — Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers*, 56 N.C. L. REV. 341, 349 (1978). *See also* 838 ANTITRUST & TRADE REG. REP. (BNA) A-6 (November 10, 1977); 852 ANTITRUST & TRADE REG. REP. (BNA) A-8 (February 23, 1978) (remarks of Daniel Berger). The analytical confusion that could result indicates that a limited overturning of *Illinois Brick*, such as that suggested in Section IV *infra*, is a preferable solution.

51. The House bill in the first session of the 95th Congress was H.R. 8359; it has been replaced in the second session by H.R. 11942. The Senate bill has retained the same number in both sessions.

52. Both bills currently include provisions that would in addition override the Supreme Court's decision in Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978). The Court in *Pfizer* held that foreign governments were persons within the meaning of § 4 of the Clayton Act and were thus entitled to maintain treble damage actions in United States courts. The issues involved in *Pfizer*, however, do not necessarily involve pass-on and those portions of the anti-*Illinois Brick* legislation dealing with *Pfizer* are not considered in this Note.

53. H.R. REP. No. 95-1397 pt. 1, 95th Cong., 2d Sess. at 29 (1977) [hereinafter cited as HOUSE REPORT].

54. S. 1874, 95th Cong., 1st Sess. §§ 1-3 (1977), *reprinted in Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings Before the Subcomm. on Antitrust and Monopoly of the [Senate] Comm. on the Judiciary*, 95th Cong., 1st Sess. 205 (1977) [hereinafter cited as *Senate Hearings*]. H.R. 8359, 95th Cong., 1st Sess. §§ 1-3 (1977), *reprinted in Effective Enforcement of the Antitrust Laws: Hearings Before the Subcomm. on Monopolies and Commercial Law of the [House] Comm. on the Judiciary*, 95th Cong., 1st Sess. 2-3 (1977) [hereinafter cited as *House Hearings*].

55. *House Hearings* at 76 (testimony of Phillip Areeda).

56. Sections 3 and 4 of S. 1874 at this point stated:

SEC. 3 (a) Section 4 of the Clayton Act is amended—(1) by inserting "(a)" immediately before "Any"; and (2) by adding at the end thereof the following "(b)" In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.

(b) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to

Monopoly apparently considered a one-sided rule unfair and dangerous because of the multiple liability possibilities. This altered version of S. 1874 was subsequently adopted by the Senate Subcommittee on Antitrust and Monopoly and reported to the full Committee on the Judiciary on November 4, 1977.[57] The Senate Committee on the Judiciary reported a substantially similar bill to the Senate on May 25, 1978.[58]

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others, who are themselves entitled to recover under section 4, 4A or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.

SEC. 4 The amendments made by this Act shall apply to any action commenced under sections 4, 4A, or 4C(a)(1) of the Clayton Act (15 U.S.C. 15, or 15(c)(a)(1)), which was pending on June 9, 1977, or filed thereafter. Provided, however, that except in an action pursuant to Section 4C of the Clayton Act nothing herein shall authorize a class action on behalf of natural persons who have not dealt directly with the defendant.

Reprinted in 831 ANTITRUST & TRADE REG. REP. (BNA) A-6 (September 22, 1977); 836 ANTITRUST & TRADE REG. REP. (BNA) A-12, A-13 (October 27, 1977).

Another version circulating at this time, proposed as an alternative to S. 1874 by Senator Thurmond, would insert after the word "injured" in section 4:

injured in fact, directly in his business, or property by anything forbidden in the antitrust laws, or injured in fact, indirectly in his business or property by any contract combination or conspiracy to fix prices.

Section 4A would be similarly amended. Section 4C would be amended to read, in part:

Any attorney general of a state may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such state . . . to secure [treble damages] for injury in fact sustained directly by such natural persons to their business or property by reason of any violation of the Sherman Act, or indirectly by such natural persons to their business or property by a reason of any contract, combination or conspiracy to fix prices.

This proposal would also reverse the effect of *Hanover Shoe* and permit the assertion of a pass-on defense: "It shall be a defense in any action for damages brought hereunder that overcharges directly resulting from violations of the Antitrust laws have been passed on to subsequent purchasers in the chain of distribution." *Senate Hearings* at 299.

57. S. REP. No. 95-934 pt. I, 95th Cong., 2d Sess. at 33 (1978) [hereinafter cited as SENATE REPORT].

58. *Id.* at 31. The bill as finally reported out of committee reads, in part:

FINDINGS AND PURPOSES

SEC. 2 (a) The Congress finds and declares that—

(1) the antitrust laws are intended to protect the right of consumers to receive the better products and lower prices that competition produces;

(2) in order to achieve that purpose it is essential that ultimate consumers be able to recover damages for antitrust violations whether or not they have dealt directly with an antitrust violator;

(3) by depriving consumers who are indirect purchasers the right to sue, the Supreme Court's decision in *Illinois Brick Company against Illinois* frustrates effective antitrust enforcement and deprives many consumers of a just remedy for their injury;

(4) there are indications that the Courts might construe *Illinois Brick Company against Illinois* as depriving producers who are indirect sellers of the right to sue; such construction would frustrate effective antitrust enforcement and deprive many producers of a just remedy for their injury; and

(5) if the first or "direct" purchaser from an antitrust violator is permitted to recover the entire amount of an overcharge even though he has passed most or all of such overcharge on to others, that first or "direct" purchaser receives an undeserved windfall at the expense of ultimate consumers.

(b) It is the purpose of this Act—

(1) to permit consumers, producers, businesses, and governments injured by antitrust violations to recover whether or not they have dealt directly with the antitrust violator;

(2) to minimize windfall recoveries by limiting the recovery of a middleman to the damage incurred and to minimize recovery by the middleman for damage passed on by the middleman to others rightfully entitled to recover on their own behalf;

(3) to make clear that consumers and the attorneys general of the several States on behalf of the consumers of their respective States can recover for antitrust violations which

The House Subcommittee on Monopolies and Commercial Law had greater difficulties with revisions to its initial version of the *Illinois Brick* bill.[59] Its final version was submitted to the full Committee on the Judiciary as a clean bill on April 6, 1978.[60] The full Committee then reported the same bill, set out in the footnote,[61] to the House on June 20, 1978.[62]

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injure such consumers whether or not such consumers have dealt directly with the antitrust violator;

(4) to preserve the method of proving and calculating damages provided in Sections 4D and 4E of the Clayton Act for actions pursuant to Section 4C of such Act;

(5) to make clear that producers can recover damages for antitrust violations irrespective of whether such producers have dealt directly with the antitrust violator; and

(6) except as made necessary by this Act, to reserve to the courts the applications and revision of existing principles of remoteness, target area, and proximate causation which have been applied to limit the persons who can recover for antitrust violations.

CLAYTON ACT AMENDMENTS

SEC. 3. The Clayton Act is amended by inserting immediately after Section 4H the following new section:

SEC. 4I. (1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.

(2) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to others, who are themselves entitled to recover under section 4, 4A, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.

APPLICABILITY OF AMENDMENT

SEC. 4. The amendment made by this Act shall apply to any action commenced under section 4, 4A, or 4C(a)(1) of the Clayton Act which was pending on June 9, 1977, or filed thereafter.

FOREIGN SOVEREIGNS

SEC. 5. [The *Pfizer* amendment]

Reprinted in SENATE REPORT at 35.

59. 846 ANTITRUST & TRADE REG. REP. (BNA) A-4 (January 12, 1978).

60. HOUSE REPORT at 30.

61. The bill as finally reported out of committee reads, in part:

SEC. 2. The Clayton Act is amended by inserting immediately after Section 4H the following new section:

SEC. 4I.(a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods, or services shall, upon proof of payment of all or any part of any overcharge for such goods or services, be deemed to be injured within the meaning of section 4, 4A, or 4C of this Act: *Provided, however*, That such indirect purchaser may recover damages, only with respect to the amount of the initial overcharge proved to be passed on to him.

(b) Any indirect seller in the chain of manufacture, production, or distribution of goods or services shall, upon proof of receipt of all or any part of any underpayment for such goods or services, be deemed to be injured within the meaning of section 4, 4A, or 4C of this Act: *Provided, however*, That such indirect seller may recover damages only with respect to the amount of the initial underpayment proved to be passed on to him.

(c) In any action under section 4 or 4A of this Act, any defendant, as a partial or complete defense against a damage claim, shall be entitled to prove that—

(1) a purchaser in the chain who paid any overcharge passed on all or any part of such overcharge to another purchaser in such chain; or

(2) a seller in the chain who received any underpayment passed on all or any part of such underpayment to another seller in such chain.

(d)(1) In any class action brought under section 4 of this Act by purchasers or sellers, the fact of injury and the amount of damages sustained by or passed-on to or by the members of the class may be proven on a class-wide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of

II. THE PASS-ON ISSUE

A. *The Scope of the Problem*

Price fixing and other antitrust violations[63] present special problems when the affected item passes through a manufacture or distribution

such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

(2) In any action under section 4C of this Act, the fact of injury and the amount of damages sustained by or passed-on to or by purchasers or sellers may be proven on a class-wide basis, without requiring proof of such matters with respect to each individual purchaser or seller. The percentage of total damages attributable to a member of a class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

(3) Except as provided in sections 4D and 4E of this Act, damages shall not be assessed in the aggregate against a defendant but shall be assessed only on behalf of any person who makes a valid damage claim.

(e)(1) Except as provided in paragraph (2) of this subsection, any damage award in a final judgment heretofore or hereafter rendered against any defendant in any action under section 4, 4A, or 4C of this Act shall be admissible as—

(A) prima facie evidence against any plaintiff and

(B) conclusive evidence against such defendant, in any other action under section 4, 4A, or 4C, of this Act brought against such defendant, as to all fully and fairly litigated matters regarding the amount of damages passed on which would be an estoppel as between the parties thereto.

(2) This subsection shall not apply to consent judgments or decrees.

(f) In any action by purchasers or sellers under section 4 of this Act which is brought or maintained as a class action, the court, before it approves a settlement of such action, shall, in the interest of justice, determine what portion of the settlement shall be distributed to the persons on whose behalf the action was brought or maintained and what portion shall be distributed to their attorneys, and in making such determinations the court shall act as a fiduciary for those persons on whose behalf the action was brought or maintained.

(g) In any action under section 4 of this Act—

(1) by, or on behalf of, any purchaser in the chain of manufacture, production, or distribution of goods or services alleging any overcharge for such goods or services, or

(2) by, or on behalf of, any seller in the chain of manufacture, production, or distribution of goods or services alleging any underpayment for such goods or services, the court may in its discretion award a reasonable attorney's fee to the prevailing defendant upon a finding that such purchaser or seller or his attorney acted in bad faith, vexatiously, wantonly, or for oppressive persons [sic].

SEC. 3. [The *Pfizer* amendment].

SEC. 4. Section 1407(h) of title 28, United States Code, is amended by striking out "section C4 of".

SEC. 5. The amendments made by this Act shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after such date of enactment.

Reprinted in HOUSE REPORT at 1.

62. HOUSE REPORT at 30.

63. Although pass-on problems frequently arise in price fixing violations, they may also arise in connection with other antitrust violations. Tying arrangements are one example. A tie-in occurs when one party sells a product to another only on the condition that the buyer also purchase a particular second product from it. This latter product is "tied" to the sale of the first. The question arises whether indirect purchasers who purchase the tied product have a right of action against the violator. Another situation presenting pass-on problems occurred in Gas-A-Tron of Arizona and Coinoco v. American Oil Co., 1977-2 TRADE CAS. ¶ 61,789 (D. Ariz. 1977). One of the plaintiff retailers contended in *Gas-A-Tron* that the defendant refiners' refusal to supply a sufficient quantity of gasoline to the plaintiff's suppliers had caused it injury. The district court refused to distinguish *Illinois Brick* and granted summary judgment in favor of the defendant on the claim for refusal to supply. The Court noted that

[b]y proving the additional amount of gasoline which would have been sold to *them* by their suppliers if their suppliers had been sold enough refined products and crude oil, the plaintiffs could assume that the prices were legal and merely calculate lost profits from lost sales volume. Nevertheless, the Court would be left with the problem of allocation of an

chain.[64] The defendant's unlawful activity sends repercussions down the chain, with one or more purchasers potentially bearing the brunt of the illegal overcharge. While at first blush the problem appears to be relatively clearcut—simply to determine who has absorbed the overcharge from the illegal conduct—complications develop, primarily because the features of the particular market can thrust uncertainty into the proof process.

Only under certain extreme and highly unlikely market conditions will the direct purchaser either absorb or pass on the entire overcharge. Only in a completely competitive market in which supply is perfectly inelastic or demand is perfectly elastic will a direct purchaser bear the full burden. Conversely, only in a completely competitive market in which supply is perfectly elastic or demand is perfectly inelastic will a direct purchaser be able fully to pass on the overcharge to other buyers.[65] Ordinarily, the direct purchaser will be able to pass on part of the overcharge but be forced to absorb part of it itself. A similar result will generally occur at each succeeding link in the chain. Moreover, even though a purchaser in the chain has been able to pass on part of the overcharge, that purchaser may also have lost profits on additional sales that it could have made but for the higher prices that the defendant's illegal activity forced it to charge.[66] In any suit it might bring, then, it should be able to recover both for the lost profits on sales it could otherwise have made as well as for the percentage of the overcharge that it did not pass on.[67]

Judicial difficulties with pass-on cases are compounded by the existence of different types of manufacture or distribution chains. This Note distinguishes two types, to be termed "the basic chain" and "the altered product chain." The basic chain describes a market in which the violator is the manufacturer or producer of the product in its finished form

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increased supply of refined products to plaintiff and the effect on plaintiff's sales volume of competing in a market where they as well as others had independent and strong suppliers.

The complications in proving damages are similar to the pass-on of overcharges and the Supreme Court's stated policy of avoiding such uncertainties in allocation of damages applies here as well.

1977-2 TRADE CAS. at 73,246.

64. Note, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 978 (1975).

65. Schaefer, *Passing on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. AND MARY L. REV. 883, 891 (1975).

Elasticity defines the degree to which supply and demand change with each change in price. If the demand for a product remains constant regardless of the price, the product is demand inelastic. Effects of an increase are therefore absorbed by the purchaser. Concomitantly, if the demand for a product changes depending on the price, the product is demand elastic. In that situation, effects of an increase are absorbed by the supplier.

66. The determination of lost sales will again depend on the relative elasticities of the market in which the purchaser trades.

67. Recoveries in this latter situation will not necessarily be duplicative. While the direct purchaser may have been able to pass on part of the overcharge and absorb part, it may also have lost sales to potential customers who moved into substitute markets in rejection of its higher prices.

(*e.g.*, an automobile manufacturer). The second type of chain, the altered product chain, exists when the product undergoes one or more changes as it passes through the chain. The violator is no longer the manufacturer or producer of the product in its final form, but is generally either the supplier of some part that is used by a purchaser to manufacture a different product (*e.g.*, the supplier of steel for automobiles) or the supplier of machinery or parts of machinery used to manufacture a product (*e.g.*, the supplier of special tools used in the manufacture of automobiles). The determination of damages near the top of the basic chain is easiest. The absence of numerous changes in the affected product reduces the number of factors that contribute at each level to an ultimate pricing decision. Judicial isolation of each factor is thus less difficult than when the product has approached the terminus of a long basic chain or undergone transformations and thus entered an altered product chain.[68]

B. *The Inadequacy of the* Illinois Brick *Solution*

The preceding description of the nature of chains, each single type of which might have two, three, or more links in it, illustrates why the simple rejection by the Supreme Court in *Illinois Brick* of all indirect purchaser suits is unacceptable. The influences on the pricing decision at each level often become so complex that the illegal activity cannot be adequately identified as the cause of a price increase. Nevertheless, an approach that fails to distinguish chains for which damages are impossible to compute from chains that are susceptible to proof of damages unjustifiably denies to some indirect purchasers a federal forum for relief.

One example of a relatively simple chain is *Illinois Brick* itself. There, eleven manufacturers of brick in the Chicago area fixed the prices of the product to subcontractors who eventually did the cement work for public buildings for the State of Illinois. Formation of the bids by the general contractor was typical—each received the various contractors' bids, marked them in, added them up, and determined its profit accordingly. Since these eleven manufacturers held a virtual monopoly in the area, the cost of brick was essentially constant. Overcharges, therefore, passed through the chain to the ultimate consumer:

> Based on the lowest quotation he receives, the contractor includes the full cost of the concrete block, or masonry subcontract, in his bid as a known cost. The contractor totals his material, labor, and subcontract costs, then adds a variable percentage for overhead and profit . . . . The masonry and general contractors are nothing more than conduits between defendants and plaintiffs. The contractors absorb none of the illegal overcharges, but

68. For an interesting offshoot of the basic chain, see Philadelphia Hous. Auth. v. American Radiator and Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator and Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), in which it was claimed that the price overcharge on various types of plumbing fixtures used in the construction of houses in some instances reached second and third buyers of the finished houses. *See* notes 73-78 and accompanying text *infra*.

recover it completely (and more) from the state of Illinois and its public agencies.

> The cost of concrete block is "known" in advance of bidding; any increase in this cost has a direct impact on the state of Illinois . . . . While the final bid will depend on the contractor's estimate of . . . factors [such as his work force, overhead, risk, and competition], the basic fact remains, that the contractor's bid directly includes the total cost to him of the concrete block. The only independent pricing decision made by the contractor is how much markup should be put on the cost for concrete block.[69]

Thus, although the product had undergone a transformation and passed through several links in a chain, the type of product, the pricing customs in the trade, the length of the chain, and the area of geographical consideration distinguish the facts of *Illinois Brick* from the class of cases at which the Court's decision appears to have been aimed.

Moreover, the factual background of *Illinois Brick* is not unique. Prior cases brought by indirect purchaser plaintiffs in positions similar to the State of Illinois presented the courts with comparable problems of proof. In *Armco Steel Corp. v. North Dakota*,[70] North Dakota sought recovery for overcharges on steel pipes and other items used in building highways that it contended had been passed on to them as part of the bid prices on construction projects. In affirming a recovery by the state, the court wrote:

> With the same price quotation for the product being made to all contractors bidding on a highway project; with this quotation being used by the contractors as their cost basis for the product in computing their project bid; and with the conspirators having knowledge of this bidding reality and making quotation of their unlawfully-fixed prices on that basis—there could hardly be much question that such prices, in their margin of artificiality from lack of competitive play, operated directly to injure the state in increased cost of its highway projects.[71]

A case revealing a similar point of view is *Missouri v. Stupp Bros. Bridge and Iron Co.*[72] In neither did the court accord any weight to arguments

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69. Respondant's Brief on the Merits at 20, 21, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). One of the contractors in the *Cement* price fixing cases stated in an affidavit:

> 1. Each public road construction contract is composed of separate items of work. Each item of work typically is composed of certain materials and labor costs. Certain items may also involve equipment costs.
>
> 2. The company uses a work sheet to compute the lowest cost to complete each item of work set forth in the contract. The company, in making its computation, ascertains in regard to each item, the actual cost, to the extent applicable, of the material, labor and equipment involved. The cost of those items of work to be covered by a subcontract, such as paving, is ascertained by obtaining bids from one or more subcontractors.
>
> . . . .
>
> 5. The total bid price is arrived at by adding thereto additional amounts for overhead, contingencies, and profit. These amounts vary from job to job.

In re Western Liquid Asphalt Cases, 487 F.2d 191, 195 n.4 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. of Cal. v. Alaska, 415 U.S. 919 (1974).

70. 376 F.2d 206 (9th Cir. 1967).

71. *Id.* at 210.

72. 248 F. Supp. 169 (W.D. Mo. 1965).

about the difficulties of proving damages or the potential risks of multiple liability to which the defendant might be subjected.

The major case rejecting offensive pass-on prior to *Illinois Brick* is *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*,[73] commonly called *Mangano*. Yet careful consideration of *Mangano* militates against indiscriminately applying its arguments to all indirect purchaser cases. The proof difficulties that led the *Mangano* court to reject offensive pass-on are of a different dimension than the difficulties that arise in a case such as *Illinois Brick*.[74]

The chain of distribution in *Mangano* was approximately this: Defendant manufacturers of plumbing fixtures sold to wholesalers, who sold to plumbing contractors, who sold to builders, who constructed homes and then sold them to consumers, who themselves might have resold the homes to any number of other buyers.[75] Commenting on this market structure, the court in *Mangano* stated that

> there is no assertion here that defendants through their alleged conspiracy, controlled any market beyond that in which they sold the fixtures to wholesalers. Instead there is no reason to assume that all of the additional factors referred to by the Supreme Court in *Hanover* as influencing a seller's pricing policies were not involved here. This is particularly evident at the builder level. For plaintiffs would have the court believe that as the result of an overcharge of approximately ten to twenty dollars, a builder selling a twenty, twenty-five, or thirty thousand dollar house raised his price to reflect this overcharge (assuming such overcharge reached the builder). Such a view strikes the Court as incredible.[76]

The court correctly identified the pass-on issue as concerning the inability to determine damages:[77] "[T]he claims of the plaintiffs under consideration in their capacity as homeowners are blocked by unsurmountable difficulties of proof."[78]

The inadequacy of *Illinois Brick*, therefore, lies in the Court's conscious decision not to attempt to separate those cases that unquestionably present insurmountable difficulties of proof from those in which damages can be more easily determined.[79] A resolution of the indirect purchaser problem is proposed in Section IV of this Note; it acknowledges the benefits of distinguishing the *Illinois Brick* class of case from the *Mangano* class. In addition to compensating greater numbers of injured persons,

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73. 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator and Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

74. Even the Senate and House Judiciary Committees agree that the result in that case was correct. SENATE REPORT at 11; HOUSE REPORT at 18. Both, however, disagree with the reasoning used to reach that result.

75. 50 F.R.D. at 19-20.

76. *Id.* at 26.

77. *Id.* at 20. *See* notes 92-95 and accompanying text *infra*.

78. *Id.* at 26.

79. 431 U.S. at 744.

the suggested approach would preserve the deterrent function of the private treble damage action by threatening the potential violator with suit by many members in the chain. Before outlining this approach, however, this Note will examine two judicially developed doctrines that are critical to a resolution of the problems that the Congress faces in drafting pass-on legislation.

III. SECTION 4: STANDING AND INJURY

Section 4 of the Clayton Act authorizes private civil treble damage actions to redress violations of the antitrust laws. This grant of "standing"[80] to private parties reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.[81]

To recover under this provision the plaintiff must allege and prove (1) a violation of the antitrust laws by the defendant, (2) an injury to plaintiff's own business or property, and (3) the necessary causal relation between the violation and the injury.[82] The seeming simplicity of these requirements, however, is obscured by various judicial impediments; the two most necessary to a complete understanding of the pass-on issue—standing and the requirement of injury—are considered in some detail below.

A. *Standing*

An antitrust violation often has untold effects on distant areas of the economy; the potential number of "injured" persons may be virtually endless. The question thus arises whether all persons who meet the technical requirements of section 4 should be permitted to maintain suit. The "ripple effect" inherent in any antitrust violation has led the federal courts to engraft upon the "by reason of" language in section 4 a standing requirement of legal, in addition to merely factual, cause.[83] Derivative

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80. In antitrust, standing might conceivably take one of two slightly different meanings. Since § 4 creates a cause of action, whenever a plaintiff fails to satisfy the criteria in § 4 it lacks standing. "Standing" is used in this general manner in the text above. The federal courts, however, have gone beyond this first meaning to fashion a doctrine of antitrust standing out of the "by reason of" language in § 4 in order to limit the statutory action to those parties most directly affected by the violation. *See* notes 81-95 and accompanying text *infra*. For the rest of this Note the term "standing" will be used in the latter, more restrictive sense.

81. 15 U.S.C. § 15 (1976).

82. The injury and causal relation requirements are together known as the fact of damage. *See* note 96 and accompanying text *infra*.

83. Pollack, *The "Injury" and "Causation" Elements of a Private Treble Antitrust Action*, 21 ABA ANTITRUST SECTION 342, 347-48 (1962), *reprinted with additions in* 57 NW. L. REV. 691 (1963).

injuries that flow from the fact of injury to someone more directly connected to a violation, as well as other injuries that are incidental to the impact of the violation, have frequently been denied legal sanction by the courts. Although there has been virtual unanimity in the belief that some limitation should be placed on a section 4 action,[84] the development of a coherent law of antitrust standing has eluded the federal judiciary.[85] At the present time the lower federal courts[86] are divided between a strict and a more liberal approach, as reflected in the so-called direct injury and target area tests.[87]

The direct injury test is the stricter test and is in form reminiscent of common law privity notions, providing standing only to those plaintiffs who have suffered direct harm from the defendant.[88] The target area test, on the other hand, focuses on a more comprehensive question: The plaintiff "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[89] Unfortunately, these two formulations can lead to disparate results in practice.[90] As a result, a few courts have shunned both tests, relying instead on a policy-based approach.[91]

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84. For a vigorous criticism of this position, see Judge Levet's dissent in Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1298 (2d Cir. 1971).

85. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 27 (1971).

86. The Supreme Court itself consistently denies certiorari on this point, refusing to give its imprimatur to any of the existing tests. Nevertheless, comments in a recent decision indicate that the Supreme Court agrees with the lower courts that the treble damage action must not be without some limits. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 263 n.14 (1972).

87. The Sixth Circuit has adopted a third test that occasionally receives mention in other circuits as well. Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). In *Malamud* the Sixth Circuit used the test of standing set forth in Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). The court noted that the plaintiff "arguably comes within the zone of interests protected by the Sherman and Clayton Acts." 521 F.2d at 1152.

88. This test had its origins in Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910), one of the earliest cases interpreting the treble damage provision. In that case the plaintiff, who was a stockholder, creditor, and employee of a photographic supply manufacturer, was denied standing to challenge the defendant's alleged attempt to monopolize the photographic industry. The court stressed that the remedy rested in the corporation: "No conspiracy or combination against him as a stockholder or creditor is alleged. The injury complained of was directed at the competition, and not the individual stockholder." *Id.* at 709.

More recently, the court in Snow Crest Beverages v. Recipe Foods, 147 F. Supp. 907 (D. Mass. 1956) alluded to this test: "It is well settled that despite its broad language Section 4 of the Clayton Act does not give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws." *Id.* at 909.

89. Conference of Studio Unions v. Lowe's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

90.

> In a long line of cases courts have found that shareholders, creditors, employees, lessors, patent licensors, and suppliers are not deemed to have been injured within the meaning of the statute by infractions having a more immediate impact upon others. At the same time, other courts, with respect to several of these categories, have reached opposite conclusions.

Handler, *supra* note 85, at 24-25.

91. *See, e.g.*, Cromar Co. v. Nuclear Materials & Equip. Corp., 453 F.2d. 501 (3d Cir. 1976); Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 702 (D. Mass. 1970). Viewing the confused state of the law in this area, Judge Ely of the Ninth Circuit recently remarked that "[u]nfortunately, no bright

This confusion in the development and application of an antitrust standing doctrine may have developed because courts have relied on standing as an umbrella doctrine for various purposes.[92] Some courts, for example, confuse the procedural issue of standing with the substantive issue of determining whether a violation has occurred.[93] Other courts have utilized a standing doctrine to justify their decisions about pass-on.[94] The result of such tendencies is to obscure these related, although distinct, issues.

The inquiry for the court at the stage at which standing per se should be determined is not necessarily whether a party has a valid claim, that is, whether it can establish the three requirements of section 4, but rather whether this party, even though it may be able to prove the technical requirements of section 4, is the proper party to present that claim. The purpose of the direct injury and the target area tests of antitrust standing is to pare the number of antitrust claims; the tests were designed to crystallize into a workable formula criteria that should control this determination. The issue in the pass-on cases does not necessarily concern the application of the protective umbrella of standing to control the ripple effect of an antitrust violation.[95] The greater difficulty has been the extent to which

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line has yet emerged to divine this group [entitled to protection by the antitrust laws] and courts have formulated varied definitions." *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125 (9th Cir. 1973).

92. *See, e.g., House Hearings* at 82-83 (testimony of Phillip Areeda). One of the dangers of this confusion is noted by Areeda:

> The question of standing is often misunderstood because courts use the standing terminology to express two kinds of judgments: (1) Standing may be denied because the plaintiff is just too "remote" from the transaction to be allowed to force other people to litigate about it. The shareholder or perhaps the purchaser of the secondhand house would be examples; (2) standing may also be denied because the court believes that the particular plaintiff or class of plaintiffs cannot, in all probability, establish any damage that makes it worthwhile for the suit to take place. The secondhand house buyer is certainly an example.
>
> The possibility for confusion arises because both refusals to hear a damage suit may be expressed in standing terms. A court might then unthinkingly deny standing for injunctive purposes to a plaintiff who could not prove damages adequately for treble damage purposes, but who is [not] [sic] too "remote" in the first sense I stated.

93. In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the plaintiff bowling centers challenged the acquisition by Brunswick, one of the largest manufacturers of bowling equipment, of numerous bowling centers operating in the same markets as the plaintiffs. The plaintiffs charged that the vertical integration forward into the retail market afforded Brunswick the opportunity to utilize its "deep pocket" to the competitive disadvantage of the plaintiffs. They further alleged that, had Brunswick not acquired them, the bowling centers would have gone out of business, leaving the plaintiffs a greater share of the market. The Supreme Court rejected the argument that all economic dislocations resulting from a merger are actionable. The Court noted that for the plaintiff to recover the injuries must flow from that which makes the merger unlawful. Finding that the plaintiffs in the instant case had been "injured" instead by the increased competition in the industry resulting from the continued existence of the other centers and that Brunswick had not utilized its "giant" position, the Court held for the defendants.

A number of courts confuse the substantive issue in *Brunswick* with the procedural issue of standing. For example, these courts state that because a plaintiff has not proved injury of the type that the antitrust laws were intended to prevent, it lacks standing. *See, e.g.*, Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

94. *See* note 23 and accompanying text *supra*.

95. Of course, the question might also arise whether the plaintiff is too "remote" from the violation to have standing in the proper sense. Under the target area test of antitrust standing,

damages can accurately be determined. Properly phrased, however, speculativeness goes to the questions of whether injury as well as the amount of that injury have been legally demonstrated—that is, whether the plaintiff has established the technical requirements of section 4.

The distinction between standing and section 4 injury must therefore be understood and clearly articulated by the Congress so that any legislation the Congress might pass in the belief that it will permit recovery by indirect purchasers will not be thwarted in the federal courts by the misapplication of judicially created standing doctrines. It would be ironic if the courts continued to deny indirect purchaser suits on standing grounds despite the passage of anti-*Illinois Brick* legislation.

B. *The Requirement of Injury*

The proof of section 4 injury is analytically distinct from the problem of standing. Assuming that the plaintiff can establish the requisite violation by the defendant, it must then demonstrate both injury and causation in fact; this dual requirement is sometimes referred to as the fact of damage.[96] For example, although a defendant may have committed a violation, if the plaintiff suffered no injury there should obviously be no recovery; similarly, if the plaintiff's damage was "caused" by an event other than the claimed violation there should be no recovery.[97]

The most difficult questions, and the questions most directly pertinent to the pass-on problem, concern the quanta of proof needed to establish the fact of damage to a particular plaintiff as well as its amount. The challenge is to reconstruct, to legal satisfaction, what would have happened in a perfectly competitive market. "The basic economic problem in a treble-damage suit is to attempt to 'turn back the calendar,' remove the effects of conspiratorial or other alleged illegal behavior, reconstruct and record the situation *that would have prevailed* under the type of competitive conditions *that would have existed*, absent the conspiracy or other practices or actions."[98]

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however, it would appear that the injuries that the different members in the chain ostensibly have suffered could not be characterized as collateral to the main impact: all the members of the chain are targets of the violation. *See* note 89 and accompanying text *supra*.

96. Pollack, *supra* note 83, at 342.

97. Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961). On the other hand, defendant's conduct need not have been the sole factor leading to plaintiff's injury; it is enough if defendant's conduct was a material or substantial cause. Phillips v. Crown Central Petroleum Corp., 395 F. Supp. 735, 768 (D. Md. 1975). This approach has been approved by the Supreme Court. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969).

98. Lanzillotti, *Problems of Proof of Damages in Antitrust Suits*, 16 ANTITRUST BULL. 329, 330-31 (1971) (emphasis in original). The near hopelessness of this task has inspired another writer to remark:

> Trying to figure out, for example, what *would* have happened over a period of several years to an industry price level "but for" a price conspiracy might involve numerous variables—perhaps almost as many as trying to figure out what would have happened in the Civil War if Grant had not been given command or if the Union had not won at Antietam or Vicksburg. Because of these numerous variables, the concept of antitrust "injury" necessarily consists in

Nevertheless, for the private treble damage action to remain a deterrent to anticompetitive behavior and an effective compensatory mechanism, the courts had to develop some standard of proof that would recognize the difficulties faced by the antitrust plaintiff while remaining fair to the defendant. Recognizing that the traditional standards of proof in civil actions could vitiate the treble damage action, the Supreme Court in *Eastman Kodak Co. v. Southern Photo Materials Co.*,[99] *Story Parchment Co. v. Paterson Parchment Paper Co.*,[100] and *Bigelow v. R.K.O. Radio Pictures, Inc.*[101] substantially relaxed the plaintiff's burden of proof on the amount of damages issue.[102]

This triumvirate of cases sets up a two-part test. The plaintiff must first prove the fact of *some* damage to it under the traditional preponderance of the evidence standard. After it has established the fact of some damage, the plaintiff is allowed to demonstrate the *amount* of those damages under a less exacting standard of proof.[103] In the earliest of the three cases, *Eastman Kodak*, the emerging principle was stated that "[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded although the result be only approximate."[104] This approach was developed further by Justice Sutherland in *Story Parchment*:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.[105]

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large part of hope, projections and the blue sky, and the result is that the line between legitimate and illegitimate claims is sometimes very thin indeed.

Pollack, *supra* note 83, at 344 (emphasis in original).

99. 273 U.S. 359 (1927).

100. 282 U.S. 555 (1931).

101. 327 U.S. 251 (1946).

102. Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 HARV. L. REV. 1566, 1572 (1967). The Supreme Court in *Story Parchment*, sketched the policy for this judicial move:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. . . . .
>
> . . . "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

282 U.S. at 563, 565-66 (citations omitted).

103. Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH L. REV. 231 (1961).

104. 273 U.S. at 379.

105. 282 U.S. at 562.

Bigelow, the last of the three cases, is the crucial decision in the development of proof requirements in treble damage actions. In *Bigelow* the plaintiff alleged that a discriminatory film distribution release system had prevented its acquisition of feature films until after those films had been shown in theatres controlled by the defendants. The plaintiff asserted two bases for computing damages. First, it compared the earnings of its own theatre over a certain period of time with the earnings of a theatre of comparable size controlled by one of the defendants. Alternatively, it compared its own theatre's earnings over two succeeding five-year periods. The problem with each alternative was that the defendants had controlled the market since 1927; there was simply no way of knowing what the plaintiff's profits would have been in a freely operating market.[106] As Justice Stone phrased the defendants' position, "petitioners' evidence does not establish the fact of damage, and . . . further, the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of damage."[107]

Only Justice Frankfurter in dissent recognized the significance of the defendants' position. After reaffirming the two-part test of *Eastman Kodak* and *Story Parchment*, with its foundation inquiry into whether the defendants' conduct had caused any damage *at all*, he chastized the majority for failing to make that initial determination. "The record appears devoid of any proof that, if competitive conditions had prevailed, distributors would not have made rental contracts with their respective exhibiting affiliates to the serious disadvantage of independents like the petitioners. They might individually have done so and not have offended the Sherman Law."[108]

The jury, however, returned a verdict for the plaintiff; on review, the majority in the Supreme Court upheld this verdict on the basis of the comparisons between the earnings of the two periods. Thus, a jury verdict based on comparisons between two periods, each of which was contaminated by uncompetitive conduct differing only in degree, was allowed to stand. The majority supported its decision with a statement that the jury

> could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributed to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.[109]

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106. 327 U.S. at 260-61. *See* Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 379 (1954).

107. 327 U.S. at 263.

108. *Id.* at 267 (Frankfurter, J., dissenting).

109. *Id.* at 264.

The problem with this statement is that on the facts in *Bigelow* "it cannot be said that the discrepancy was wholly unexplained except for the fact that plaintiffs were discriminately deprived of earlier runs."[110]

Bigelow, then, although adhering in word to the two-part test articulated by the Supreme Court in earlier cases, may have further liberalized that test by lessening the proof required to meet the first part of that test.[111] *Bigelow* thus illustrates the receptive approach that the Supreme Court has taken to avoid saddling the antitrust plaintiff with insurmountable barriers of proof.[112] The Supreme Court, by the mid-1940s, had recognized that for the treble damage action to remain a credible weapon of antitrust enforcement the courts had to be relatively solicitous of the antitrust plaintiff's plight.[113] *Eastman Kodak, Story Parchment*, and *Bigelow* should be read to allow the antitrust plaintiff to proceed with the best available evidence.

This judicial concern for the antitrust plaintiff and concomitant reluctance to permit the violator to profit from its own wrong characterize Supreme Court analysis prior to *Illinois Brick*. *Hanover Shoe* reinforces the policies of the earlier cases, despite language from that decision which seems contradictory:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense

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110. Clark, *supra* note 106, at 383. *But see* Pollack, *supra* note 83, at 345-46, who reads the majority opinion as stating that the fact of some damage had been demonstrated; this interpretation would make Bigelow indistinguishable from *Eastman Kodak* and *Story Parchment*.

111. A fuller discussion of the extremely liberal attitude in *Bigelow* and the implications of the decision are developed at some length in Clark, *supra* note 106.

112. Lower courts, following the import of these decisions, have continued to emphasize this lesser standard of proof on the damages issue. "A study of the adjudicated cases in this area steadily dispels any impression that this question of damages is governed by an application of the common-law rule of reasonable certainty. The cases have long since departed from this rule in antitrust litigation." Flintkote Co. v. Lysfjord, 246 F.2d 386, 391 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957).

113. A study by Richard Posner noted a dramatic increase in the number of private suits brought that roughly coincides with the *Bigelow* decision. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 373 (1970).

would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.[114]

Reviewing the quoted passage, one commentator remarked that "the Court's strictures upon pass-on proof must surely be regarded as a truly extraordinary (although unintentional) indictment of the modern treble damage remedy, for that is precisely the kind of proof regularly accepted from plaintiffs in such cases."[115] In other words, is proof of the direct purchaser's probable prices but for the overcharge necessarily so much more difficult than proof of the violator's probable prices but for the same overcharge? The apparent inconsistency, however, can be reconciled from a policy perspective.[116] The practical result of *Hanover Shoe* was to insure that there would always be a plaintiff to bring an action against a violator of the antitrust laws. The Court preferred that the direct purchaser receive a windfall rather than that the defendant retain the fruits of its illegal conduct.

Thus, the heavy burden of proof that the Court imposed on the defendant in *Hanover Shoe* reflected the Court's continuing belief that section 4 should not be rendered ineffective by harsh judicial interpretations. This concern that the dual policies of section 4, deterrence and compensation, should be carefully guarded places *Hanover Shoe* in a line of pro-enforcement decisions. The supposition by the majority in *Illinois Brick*, therefore, that an antitrust plaintiff must make an exact and detailed demonstration of the amount of harm it has suffered[117] is precisely the argument previously rejected in the *Eastman Kodak-Story Parchment-Bigelow-Hanover Shoe* line of cases. The application of *Hanover Shoe* to *Illinois Brick* leads to a curious result: arguments previously utilized to shift the risk of uncertainty over the precise amount of damages onto the defendant (who, arguably, should bear such risk) have now become a sword to exclude admittedly injured plaintiffs.[118] Before the plaintiff's shield in *Hanover Shoe* becomes the defendant's sword, denying injured parties access to the courts, the Congress should attempt to resolve the majority's concerns in *Illinois Brick* in legislation that would simultaneously preserve indirect purchaser actions.

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114. 393 U.S. at 492-93. The majority in *Illinois Brick* itself acknowledged the importance of this argument to the decision in *Hanover Shoe*. 431 U.S. at 732 n.12

115. Pollack, *supra* note 7, at 1211.

116. *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. ¶ 74,680 at 94, 978 (D. Conn. 1973). *See also In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (1973): "[In *Hanover Shoe*, the] court was applying policy to a specific case."

117. The majority apparently concedes the fact of some injury to the indirect purchaser and the issue, therefore, concerns the ability to demonstrate the amount of the injury. 431 U.S. at 735.

118. One clear line of analysis reconciles *Illinois Brick* with all prior decisions. The *Bigelow* line of cases and *Hanover Shoe* presented the Court with one plaintiff. In deciding where the risk of error in the computation of damages should fall, the Court ruled that when a violator had created the uncertainty it should not be able to avoid recovery because its conduct had made it difficult to reconstruct the market and measure damages with precision. This approach, however, is apparently

IV. THE PROBLEMS BEFORE THE CONGRESS

A. *Direct Purchasers, Indirect Purchasers—Who Will Sue?*

The majority and the dissent in *Illinois Brick* agreed on the necessity of strong antitrust enforcement and on the fundamental importance of the treble damage action in the overall statutory scheme.[119] Their disagreements centered on whether the antitrust laws would be more effectively enforced by permitting direct purchaser suits unhampered by the possibility of indirect purchaser intervention or by allowing both direct purchasers and indirect purchasers to maintain actions. The adequacy of the Congress' resolution of the disagreements will depend to a significant extent upon its ability to resolve the problems of multiple liability and damage calculation considered by the *Illinois Brick* majority and discussed in Sections B-D of this part of the Note. A resolution, however, should only be attempted if the resulting legislation can create a structure that would encourage the assertion of treble damage actions by those persons or entities most likely to bring them. The decision whether to overrule *Illinois Brick* may therefore ultimately depend upon the Congress' perception of the past performance of both direct and indirect purchasers in the enforcement of the antitrust laws.[120]

An examination of some of the developments that occurred in several

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unacceptable to the Court when pass-on is utilized as the basis for recovery. In these situations, at least one plaintiff (the direct purchaser) assumedly is able to bring suit. This plaintiff must, of course, still prove the fact and the amount of the initial overcharge, and any risk of error there created should fall, as *Hanover Shoe* and its predecessor decisions teach, on the defendant. But to proceed one step further and to permit other plaintiffs (the indirect purchasers) to attempt to prove that a portion of that overcharge properly belongs to them would create entirely new risks of uncertainty, risks that would fall not on the defendant but on the various plaintiffs to the action. The Court concluded that such an apportionment would have the pernicious effect of depleting the recoverable fund and thus discouraging the party the Court felt was the most likely plaintiff, the direct purchaser. This result the Court could not permit.

119. 431 U.S. at 745-46, 748-49.

120. The majority in *Illinois Brick* does not appear to have appreciated the importance of determining whether direct purchasers had been, or could become, the mainstays of enforcement. Significantly, Justice White noted:

> We recognize that direct purchasers sometimes may refrain from bringing a treble-damage suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose . . . under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge . . . .

431 U.S. at 746.

The *Illinois Brick* majority may also have reasoned that a confinement of recovery to the direct purchaser would encourage settlements. A violator will be more willing to settle with a direct purchaser if it knows that the direct purchaser's suit will be its only liability; a direct purchaser itself has leverage in that situation because it knows that the defendant cannot assert a pass-on defense at the trial. Since settlements avoid lawsuits that thereby do not congest the courts, they should generally be encouraged. Yet this particular hope is full of hidden inequities and misconceptions. Potential antitrust violators will be deterred from any illegal conduct only to the extent that potential risks of detection outweigh potential benefits from the contemplated activity. *See* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1321 (1973). Thus, to the extent that a defendant will be able to coerce a direct purchaser into a small settlement, perhaps by relying on jural or judicial antipathy to direct purchaser windfall, deterrence is not achieved.

major antitrust actions in recent years[121] indicates that direct purchasers played only minor roles; had *Illinois Brick* been applicable, the ultimate disgorgement from the defendants in each case would have been reduced or eliminated. In *In re Western Liquid Asphalt Cases*, for example, only a handful of the direct purchaser contractors brought suit against the defendants.[122] Similarly, the Second Circuit in *In re Master Key Antitrust Litigation*, in dismissing an appeal from an order permitting a class of indirect purchasers to maintain their action as a class action, deflated the defendants' contention that they would face the threat of multiple liability if the indirect purchasers were permitted to continue the suit: "[I]t may be pointed out here that no distributors or general contractors have come forward to file suit, even if at this late date they could do so under [the four year statute of limitations]."[123]

West Virginia v. Chas. Pfizer & Co.[124] affords a final example. The defendants made a settlement offer of $100,000,000 to states, wholesaler-retailers, and individual consumers. Notices of the pending settlement were sent to 55,000 members of the wholesaler-retailer class. Only 4100 of these direct purchasers filed claims; ultimately only three percent of the settlement fund was allocated to that section of the class.[125] Moreover, 1500 wholesaler-retailers specifically *excluded* themselves from the class. One indignant druggist from Wisconsin wrote that

> [a]ny pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists.[126]

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121. *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir.), *cert. denied*, 415 U.S. 919 (1974); *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. ¶ 74,680 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

122. 487 F.2d 191, 198 (9th Cir.), *cert. denied*, 415 U.S. 919 (1974).

123. 528 F.2d 5, 12 n. 11 (2d Cir. 1975).

124. West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

125. *Id.* at 744, 746.

126. *Id.* In addition, the Executive Director of the American Pharmaceutical Association circulated a letter among the wholesaler-retailers that "urged pharmacists not to submit claims against the settlement funds unless actual damage can be demonstrated" and that stated that "adverse public reaction could well result if pharmacists obtain a share of the settlement funds and do not pass amounts received on to patients." *Id.* at 726.

This twist illustrates another problem with placing the important burden of monitoring competitive behavior in the sole hands of direct purchasers. It might be argued that direct purchasers who refuse to sue under a direct-purchaser-only rule will have to answer to their stockholders. While this may be true in some instances, the argument, as West Virginia v. Chas. Pfizer & Co. demonstrates, has weaknesses. For instance, it applies only to direct purchaser corporations. In addition, when no criminal action has been brought exposing the illegal conduct and when the direct purchaser is able to keep the fact of the violation hidden, the injury will go unredressed. When the management of the direct purchaser corporation wishes to conceal the fact of the violation from its stockholders for some reason, the threat of an indirect purchaser suit is necessary if the enforcement purpose of § 4 is fully to be realized.

These three developments indicate that direct purchasers may not be the mainstays in the private enforcement of the antitrust laws. The Congress must determine how important direct purchaser suits actually have been in the past. Unfortunately, current research has produced inconclusive results. Perhaps the largest study undertaken so far has been by Milton Handler and Michael Blechman.[127] Handler and Blechman examined Commerce Clearing House Reports from 1971 through 1976 to discern what types of civil and criminal suits had been brought by the Department of Justice. Their thesis and conclusion was that most price fixing and other antitrust violations affected individual consumers only indirectly.

Their study, however, does not focus on the particular issues involved here and is therefore of limited utility.[129] There are two problems with the study. First, it concerned only Department of Justice civil and criminal cases; private actions were not examined.[130] Second, the stated purpose of the study was to bolster the authors' opposition to the creation of the *parens patriae* mechanism,[131] a procedural device designed to facilitate recovery by consumers who had been injured[132] by a violation of the Sherman Act. Congress will necessarily have broader concerns when it considers anti-*Illinois Brick* legislation. Such legislation would not merely favor the everyday consumer of goods but instead broadly confer a

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127. Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of* Parens Patriae *and a Suggested New Approach*, 85 YALE L.J. 626 (1976).

128. Handler and Blechman's compilation showed that only 45 out of the 346 alleged price fixing conspiracies affected consumers directly; other violations had varying degrees of indirect impact on consumers. *Id.* at 636.

129. Handler and Blechman presented to the Senate Judiciary Committee on April 7, 1978 a pilot study that does consider more carefully the indirect purchaser action under § 4, thus remedying the shortcomings of their earlier study. 859 ANTITRUST & TRADE REG. REP. (BNA) A-6 (April 13, 1978). Handler and Blechman concluded from their study of 116 private actions that 69 of those cases concerned buyers or sellers of goods or services; of those 69 cases, only three were instituted by indirect purchasers. *Id.* at A-6. Even the validity of this study, however, was questioned. Kenneth Reed, Assistant Attorney General for the State of Arizona, pointed out in testimony before the Senate Judiciary Committee on April 17, 1978, that the new Handler and Blechman study relied on cases brought in the Southern District of New York; the court sitting in that district has been traditionally unreceptive to indirect purchaser suits. 860 ANTITRUST & TRADE REG. REP. (BNA) A-8 (April 20, 1978). *Cf.* note 132 *supra* (discussing a study by Daniel Berger on pass-on cases reported since 1960).

130. The two authors argued that the study was nevertheless an accurate reflection of private litigation, relying on the assumption that § 4 litigation tends to follow in the wake of successful government prosecution. *Id.* at 634 n.42. This generally occurs, they contended, because a determination of the violation in the criminal suit need not be re-litigated in private actions, making these latter actions easier to bring. 15 U.S.C. § 16(a) (1976). Their assumptions, however, are based on 1961-1963 figures. Assistant Attorney General John H. Shenefield has noted that private antitrust cases filed in recent years in the district courts have outnumbered government suits by a factor of more than ten to one. *Senate Hearings* at 18 (testimony of John H. Shenefield).

131. *Parens patriae* is a statutory creation that permits the attorney general of each state to sue on behalf of the natural citizens of that state for injuries received by the citizens as a result of antitrust violations. The *parens patriae* device was part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 15 U.S.C. § 15c (1976).

132. The *parens patriae* device cannot be utilized to recover business-related injury. *Id.*

right of action to any indirect purchaser, either private citizen or business entity, who has dealt on an indirect basis with the violator.[133]

The *Illinois Brick* majority concluded that the complexity introduced into antitrust litigation by indirect purchaser suits[134] would reduce the direct purchaser's incentive to sue,[135] thereby frustrating the effectiveness of the private action. The Court's position, however, is unpersuasive. During the period between *Hanover Shoe* and *Illinois Brick*, five of six courts of appeals that considered the validity of indirect purchaser suits,[136] as well as practitioners,[137] the Congress,[138] and even businessmen

133. It is interesting to compare with the Handler and Blechman article a letter written by Daniel Berger to the Senate Subcommittee on Antitrust and Monopoly. *Senate Hearings* at 264. Berger had compiled a list of pass-on cases reported since 1960. His identification of 59 such cases broke down in the following manner: (a) 23 cases involved both direct and indirect purchasers; (b) 21 cases involved only direct purchasers; (c) 15 cases involved only indirect purchasers. This admittedly tentative study indicates that 60% of the reported pass-on cases since 1960 involved indirect purchasers in some manner.

134. It is uncertain to what extent the *Illinois Brick* majority viewed this complexity as a burden on the direct purchaser or as a burden on judicial resources. Early in the opinion, the majority noted:

> The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world" . . . *and of the costs to the judicial system* and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.

431 U.S. at 731-32 (emphasis added). Yet later the Court commented:

> The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damage suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. . . . The combination of increasing the costs and diffusing the benefits of bringing a treble-damage action could seriously impair this important weapon of antitrust enforcement.

Id. at 745. To the extent that the Court viewed the complexity as a burden on the direct purchaser, the Congress must assure itself that the various issues raised in the text above can be satisfactorily answered. For a discussion of the judicial resources argument, see note 155 and accompanying text *infra*.

135. 431 U.S. at 745.

136. *Accord*, Illinois v. Bristol Myers Co., 470 F.2d 1276, 1277-78 (D.C. Cir. 1972) (dictum); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1374 n.27 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) (dictum); Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). *Contra*, Mangano v. American Radiator and Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971). In addition, two other circuits considering the issue prior to *Hanover Shoe* permitted plaintiffs to demonstrate pass-on. South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967).

137. *See, e.g., Senate Hearings* at 32 (testimony of Robert O. Vaughan).

138. The Senate Report accompanying the *parens patriae* legislation notes in part:

> The economic burden of many antitrust violations is borne, in large measure, by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually results in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs. All of these violations are likely to cause injuries to consumers, whether by higher prices, by illegal limitations of consumer choice, or by illegal withholding of goods and services. . . . [The *parens patriae* legislation] rejects the rationale and result [of the decisions denying offensive pass on] and is patterned after such innovative decisions as In re Western Liquid Asphalt cases, In re Master Key Antitrust Litigation, *State of Illinois v. Ampress Brick Company* . . . . and West Virginia v. Charles Pfizer and Company.

S. REP. No. 94-803, 94th Cong., 2d Sess. 39-43 (1976) (citations omitted) (emphasis added).

themselves[139] agreed that *Hanover Shoe* had not affected their validity. Yet few had contended that such indirect purchaser suits would either reduce the incentive of the direct purchaser to sue or frustrate the effectiveness of the antitrust laws.[140] The majority in *Illinois Brick*, on the other hand, felt that a direct purchaser should not be forced to guess whether the indirect purchaser will elect to sue. Although there is undeniably a grey area within which the direct purchaser honestly cannot be certain of the indirect purchaser's intentions,[141] the majority's approach invites a further question: If the *direct* purchaser, faced with uncertainty, decides not to sue, might the *indirect* purchaser sue?

This latter question illustrates that problems still exist in determining the most likely plaintiff in a private treble damage action. Precedent does indicate a willingness by the indirect purchaser to bring major actions; there does not appear to be any evidence that direct purchasers have been deterred as a result.[142] The claims of the indirect purchaser may be substantial; without recourse to the federal courts, many will suffer severe financial loss. This Note has indicated that some of the claims heretofore brought by indirect purchasers have not presented the insuperable difficulties envisioned by the *Illinois Brick* majority. This writer urges the Congress, therefore, to explore further the important question of who will sue.[143]

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139. Former Senator Hugh Scott, one of the co-sponsors of the Antitrust Improvements Act of 1976, noted that the opponents of *parens patriae* would not have fought so hard against its passage had they not perceived its application to indirect purchaser suits. *Senate Hearings* at 6.

140. During the Senate hearings on S. 1874 there did appear to be some minor concern on this point. Neil Bernstein felt that fewer suits would result; direct purchasers would become discouraged and indirect purchasers would not take up the slack. *Senate Hearings* at 197-98.

141. Currently, a direct purchaser can, and undoubtedly does, take advantage of certain realities in antitrust litigation to appraise its situation. One must first recall that the stakes in an antitrust suit are quite high—not only does the plaintiff, if successful, recover litigation costs, but it also recovers three times damages. Also, a direct purchaser could avail itself of the relatively short statute of limitations (four years) to ride out the indirect purchaser; considering the length of discovery in a typical antitrust suit, the chances of an indirect purchaser appearing late in the trial to deprive the plaintiff of a portion of its recovery are small. Finally, the direct purchaser, if it keeps good business records, is in the best possible position to analyze its position. The problems that the *Illinois Brick* Court foresaw may simply work themselves out in the individual case as each party surveys its position.

142. There are very real reasons, on the other hand, why direct purchasers would be reluctant to sue their manufacturers or distributors. They may not want to disrupt their sole source of supply or they may be on friendly terms with the defendant. Some direct purchasers, furthermore, might feel a certain moral dishonesty in suing for damages that have been passed on to indirect purchasers. Others might have little incentive to sue if they have been able to pass on the overcharge, being unwilling to undertake the risks and high costs of litigation. Still others might be reluctant to open their files to discovery, an event certain to occur during the pretrial development of a lawsuit. Finally, a few may have reasons that actually run contrary to the purpose of the antitrust laws. If they are able to pass on the costs, they also may be able to charge an added profit themselves; therefore, they have no reason to upset the applecart.

143. The congressional hearings to date do indicate a legislative concern about the problem. *See, e.g., Senate Hearings* at 66 (testimony of Michael Blechman); *id.* at 79 (testimony of Frederick M. Rowe); *id.* at 189 (testimony of Neil Bernstein); *id.* at 131 (testimony of Earl Pollack).

At the Senate hearings on S. 1874 held in September 1977, district court Judges Real and Joiner reached interesting conclusions. Judge Real's comment was the most provocative:

B. *Paring the Number of Litigants—Standing*

1. *A Theoretical Solution*

The Congress must consider whether it is advisable to permit every indirect purchaser in a chain to sue regardless of its remoteness from the violation or whether the resulting complications would so vitiate the treble damage action that only a handful of plaintiffs would ever appear to strip the defendant of its illegal profit. To agree with Justice White that a rule permitting all indirect purchasers to maintain suit "would transform treble-damage actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant"[144] is not necessarily to conclude that a direct-purchaser-only rule is inevitable.[145] The approach outlined below attempts to pare the number of plaintiffs. It recognizes that in any particular antitrust violation certain groups of potential plaintiffs are likely to have borne substantial portions of the overcharge[146] and that the dual policies of deterrence and compensation that undergird the treble damage provision are best served by a limiting rule that would admit only such plaintiffs. It is true that any attempt to permit some plaintiffs to sue while excluding others can result in claim-ranking. Nevertheless, an approach such as that suggested below, although difficult to implement, may be preferable to one that aggregates recovery in the direct purchaser and is therefore arbitrary in some cases.

Section 4 must be capped to limit the action to those parties most directly affected by the violation; injuries collateral to that main impact

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> I can visualize that there would be reluctance in many cases for the direct purchasers to bring an action for violation of the antitrust laws. I think it may be evident from the fact that generally—and generalizations are very bad—the way a direct purchaser brings an action for violations of the antitrust laws is generally in answer to a suit by the supplier for a bill that is unpaid.

Senate Hearings at 100. But see the astonishment expressed at this remark by Earl Pollack in his own testimony: "I am sure that Judge Real may reconsider and agree with me that the overwhelming bulk of private antitrust enforcement, even since the enactment of the Clayton Act, has been through actions brought by direct purchasers. I say that unequivocally." *Id.* at 131.

Judge Joiner's remarks, although more tempered than Judge Real's, also indicate uncertainty about the question:

> I tried to look back at the cases involving antitrust violations which have come before me, and I think in all the cases which have come before me direct purchasers have been involved in one way or another . . . .
>
> I must tell you that about half of these cases were cases in which the antitrust claim was made by way of defense to another claim which was made against the direct purchaser, so I think that cannot count too heavily because it becomes defensive at that point. However, I have not found in the history of the cases which have been before me that direct purchasers were in any way inhibited in suing.

Senate Hearings at 155-56.

144. 431 U.S. at 740.

145. *See* Section IV(A) *supra.*

146. *See* Section IV(C) *infra.*

should not be recognized by the courts. Indeed, there is no reason why a standing doctrine, properly defined, cannot be developed to make the delimitation required in pass-on cases. The problem in the past has been a judicial use of the standing doctrine as a diversion from the proper inquiry of whether damages could ever be proved.[147]

The development of a new standing doctrine in the pass-on context must be consistent with the policies that standing is meant to serve.[148] This standing doctrine must also recognize the practicalities of the huge antitrust lawsuit. Few would argue, for instance, that all of the taxpayers of the State of Illinois, who ultimately may have borne the overcharge on the bricks in *Illinois Brick*, should be able to maintain an action. The sheer size of the usual antitrust case and its attendant costs to the litigants and the court system suggest the need for a cut-off point. Thus, to recognize the claims of every Illinois taxpayer may well be fruitless because the time and expense far outweigh the expected return. Yet these concerns should not prevent adjudication of the claims of the state itself, especially when the evidence indicates the occurrence of a pass-on.[149] It is therefore desirable in determining the proper plaintiffs to distinguish those purchasers in the chain who may have absorbed substantial portions of the overcharge and who thus present the greatest possibility of determining damages.

A statute cannot realistically draw a distinct line between permissible and impermissible claims. Legislation should instead indicate the desire of the Congress that section 4 benefit direct purchasers and a limited number of indirect purchasers. It should provide a flexible structure that the courts can apply to implement the congressional directive.

This writer argues that any solution must create a structure that would ensure the plaintiffs in the basic chain[150] a section 4 cause of action; as was indicated in Section II(A), these purchasers present the easiest cases to prove. This approach would encourage the plaintiffs in the basic chain to act vigilantly as private attorneys general. In addition, it would place any potential violator on notice of the possibility of suit by more than one party.

A purchaser outside the basic chain should not automatically be denied standing. Instead, a threshold question should be whether any purchaser within the basic chain has yet sued. If none has sued, then

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147. *See* Section III(A) *supra.*

148. A thorough analysis of the reasons and policies for a standing doctrine is in Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. J. 809 (1977). The authors stress three major policies militating in favor of a standing doctrine—fear of duplicative recoveries, fear of ruinous liability, and concern with burdening the judiciary with long and complex litigation. *Id.* at 850-57.

149. *See* Section IV(C) *infra.*

150. For this writer's definition of "basic chain," see Section II(A) *supra.*

standing should be granted as a matter of law[151] to assure that a violator does not escape unscathed.[152] Thus, in *Hanover Shoe*, if the manufacturer of the shoes had not sued the manufacturer of the shoe machinery, a group of buyers should have been permitted to institute a class action.

Finally, the court should not immediately dismiss an outsider's suit even if a plaintiff within the basic chain has sued. The court should instead make a preliminary inquiry to determine whether this potential plaintiff can present a substantial claim. The purchaser outside the chain should be required to present evidence indicating that the particular market in which the violation occurred made it likely that a significant amount of the overcharge had been passed on to it.[153] In effect, the outsider would have to assure the court that the deterrent and compensatory policies of the treble damage provision would be fostered by the lawsuit. This Note previously posited that a standing doctrine should not be used when the issue concerns difficulties in damage calculation.[154] The suggestions now urged are not contradictory since they would not require the court to determine whether damages were speculative but rather to determine whether administrative costs to litigants and the court system militate against any further consideration of a particular plaintiff's action.[155]

2. *Congressional Responses*

The two bills before the Congress have attempted to resolve the question whether any limitation should be placed upon the number of indirect purchasers permitted to sue. These resolutions are now considered in light of the solution suggested above.

a. *S. 1874.* The Senate bill contains no express substantive provision that would limit standing to certain parties in the chain. The only discussion appears in the "Findings and Purposes" portion of the bill which states, in part, that one of the purposes of S. 1874 is "to reserve to the courts the applications and revision of existing principles of remoteness,

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151. It is unlikely, at least under the target area test of standing, that an indirect purchaser in a chain could otherwise be denied standing. *See* note 95 *supra.*

152. It is possible that a direct purchaser or another indirect purchaser higher in the chain might assert an action subsequent to the commencement of an action by a purchaser lower in the chain. At the time the indirect purchaser outside the basic chain commences its suit, however, there is no certainty that any other person will either commence a suit or at least intervene; out of considerations of equity, therefore, the initial plaintiff ought to be permitted to continue in the action and present its damage claim.

153. Thus, in *Illinois Brick* the plaintiff state, although outside the basic chain (the brick had undergone a transformation before it reached the state) should be permitted to demonstrate the type of market in which it was dealing. *See* note 69 and accompanying text *supra.*

154. *See* Section III(A) *supra.*

155. The approach suggested in the foregoing text has been mentioned in the literature as one that should be considered in antitrust standing questions generally. *See* Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U.L. REV. 374, 403 (1976). *But see* Berger & Bernstein, *supra* note 148, at 857 ("In any event, given the inequities and impracticalities of balancing substantive claims against administrative costs, courts would be well advised to avoid using standing determinations as cost-cutting devices.").

target area, and proximate causation which have been applied to limit the persons who can recover for antitrust violations."[156]

It is regrettable that the Senate has not provided in S. 1874 specific guidance that would aid the courts to develop a standing doctrine in the pass-on context. To be sure, the substantive provision in the bill that "the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery"[157] should at least preclude a court from resorting to a restrictive direct injury test of standing and force it to make additional policy choices. This Note, however, has already discussed the problems that the circuits have experienced in their attempt to articulate adequately the policies that should be considered when standing is implicated.[158] The Senate should include in S. 1874 a provision outlining the types of inquiries that a court should make when the standing of indirect purchasers is at issue; the theoretical solution sketched above provides a basis.

b. *H.R. 11942.* The House bill articulates three standing limitations:[159] (1) the plaintiff must be a purchaser or seller; (2) the purchaser or seller must be in the chain of manufacture, production,[160] or distribution; and (3) the purchaser or seller must be the recipient of an overcharge or undercharge.[161]

The courts would first be required to determine whether the plaintiff was a "purchaser" or "seller."[162] The effect of the purchaser-seller

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156. S. 1874, § 2(b)(6). *See* note 58 *supra.*

157. S. 1874, § 3. *See* note 58 *supra.* The Senate Report explains:

> The bill does, however, explicitly reject any rule of law—whether based on standing or otherwise—which would deny recovery based on a test of whether the plaintiff has dealt directly with (or is "in privity") with the defendant. In this sense the legislation goes beyond the stated holding in *Illinois Brick*—which in footnote 7 the Court expressly said was not based on consideration of standing—to provide that whatever labels are used, recovery shall not be denied an antitrust plaintiff because the plaintiff has not dealt directly with the defendant.

SENATE REPORT at 24. Especially when considered in light of § 2(b)(6) of the bill, this excerpt is confusing. Both the excerpt and § 3 of the bill appear to preclude the judiciary from resorting to a standing doctrine to bar indirect purchasers, regardless of their proximity, from bringing suit. More likely, however, § 2(b)(6) probably should be read to override the other provisions on this issue and to permit a court to continue to utilize a direct injury test of standing if that test is generally applied. *See also* SENATE REPORT at 9.

158. *See* Section III(A) *supra.*

159. *See* note 61 *supra.*

160. The House Report indicates the necessity for the inclusion of the word "production": "The word 'production' has been added because some goods, for example, cattle, wheat, and oil are not 'manufactured' in the ordinary sense of that word. Rather, they are 'produced.' Like all other commerce covered by the antitrust laws, they are covered by this bill." HOUSE REPORT at 14-15.

161. This provision is, in effect, a limitation on the types of damages for which an indirect purchaser can sue and, accordingly, will be discussed in Section IV (C) *infra.*

162. The House Report explains:

> A "purchaser" or "seller" . . . means anyone who acquires or sells a property interest in return for valuable consideration. Leases and subleases at conspiratorially inflated prices are accordingly covered. The status and purpose of the purchaser—whether commercial or noncommercial—are irrelevant. The gravamen of the action is simply that the purchaser has paid an illegally inflated price. It does not matter whether the purchaser is a consumer or business entity. When a consumer pays more by reason of an antitrust violation, he is injured

limitation is to focus the court's attention on the chain; indirect injuries and other injuries occurring to persons outside the chain, such as landlords, creditors, or stockholders, would be excluded.[163]

The most important of the three standing limitations in the bill is the "in the chain" limitation. The House Judiciary Committee, refusing to place a rigid interpretation on the phrase, creates a term of art capable of judicial evolution:

> The committee recognizes that inherent limitations in the judicial fact-finding process will make proof of pass-on simply impossible in some cases. But rather than adopt an arbitrary "first-purchaser-only" rule, the committee intends that the courts decide who is "in the chain" and who can prove injury, on a flexible and factually sound basis. Hence, the "in the chain" phrase is both an authorization and a limitation on the right to prove pass-on.[164]

Significantly, the Committee states that it is rejecting "an arbitrary limitation of those who can sue—that is, those who are 'in the chain'—to purchasers or sellers who purchase or sell goods in the same form as they were sold or purchased by the violator."[165] The "in the chain" requirement as articulated by the House provides a practical starting point for limiting the number of indirect purchasers who can sue under section 4. Unfortunately, the House bill fails to provide further guidance and therefore would permit courts to fall back on their traditional standing rules. The suggestion of this Note, that the court select a core of plaintiffs and add further plaintiffs who appear to have absorbed substantial portions of the overcharge, could supply the guidance that the House bill lacks.

C. *Determination of Damages*

1. *The Necessity of Adopting the* Bigelow *Approach*

The inequity of *Illinois Brick* lies in the majority's refusal to recognize that all indirect purchaser claims do not present like degrees of difficulty in determining damages. This inequity is made even more apparent when

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in his "property," and may prove his injury as an indirect purchaser under this bill or as a direct purchaser under Section 4, 4A, or 4C.

HOUSE REPORT at 15.

163. The purchaser-seller limitation does not present any innovations, but merely codifies the current case law of antitrust standing. It is difficult, therefore, to understand the position of Representatives Wiggins, Railsback, Butler, Moorhead, Kindness, and Sawyer, who dissented from H.R. 11942. They criticized the limitation: "This practical exclusion may facilitate judicial administration, but it does not fulfill the promises made that the bill will permit the injured to recover." HOUSE REPORT at 60. Since under traditional standing doctrines, indirectly injured persons such as creditors, landlords, stockholders, or corporate employees cannot recover, it is difficult to understand the significance of the dissenters' point.

164. HOUSE REPORT at 17.

165. *Id.* at 18-19. But this rejection should not preclude the courts from making a realistic evaluation of the market before them: "Nevertheless, in some cases, courts should end "the chain" at the point where the overcharged items is [sic] transformed into something else. But this decision should depend on the facts of the case and the ease or difficulty of the proof, and not any arbitrary rule." *Id.* at 19.

Illinois Brick is viewed in light of the Supreme Court's own pronouncements on the proper standards of proof for treble damages actions. Once an antitrust plaintiff has demonstrated the fact of some damage to it under the traditional preponderance of the evidence standard, the series of Supreme Court cases culminating in *Bigelow v. R.K.O. Pictures, Inc.*[166] permits the plaintiff to prove the amount of those damages suffered under a standard of proof weaker than the traditional standard. This writer previously argued[167] that these Supreme Court cases should be read to permit the antitrust plaintiff to proceed with the best available evidence and to authorize the courts to accept damage calculations whenever based on a reasonable theory. The development of a solution to the Supreme Court's concern about the supposed difficulties of proving pass-on must incorporate the policy of the earlier cases.

The argument that the *Bigelow* approach must be applied to pass-on cases is strengthened by the economic realities of an antitrust violation. A violation often occurs in a market in which demand for the product is highly inelastic, since the violator's chances of success are greater in such circumstances.[168] This is true for two reasons. First, the violator must operate in a market in which its higher prices will not result in a significant drop in sales.[169] Second, a direct purchaser receiving an overcharge is able to pass it on to an indirect purchaser; indeed, assuming that the direct purchaser operates on a cost percentage basis, its profit may even increase as a result of the violation. The direct purchaser's incentive to sue the violator therefore weakens. Consequently, whenever the relevant market is highly demand inelastic, substantial portions of the overcharge can be passed down the chain.[170]

The litigated cases demonstrate that the injured party in a chain of manufacture or distribution is frequently an indirect purchaser. For example, an economist for the plaintiff in the *Master Key* litigation concluded in an affidavit:

> Based on the preceding, we may infer that any overcharges paid for finished hardware components by general contractors are fully reflected in their bids on buildings for the State of Illinois. Moreover, because the percentage markup applied to costs by general contractors in calculating their bids are [sic] unaffected by the price of finished hardware, the full finished hardware overcharge is passed on to the State of Illinois plus the contractor's percentage markup on the overcharge. In other words, if this percentage

166. 327 U.S. 251 (1946). The earlier cases are Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), and Story Parchment Paper Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931). *See* Section III(B) *supra.*

167. *See* Section III(B) *supra.*

168. *House Hearings* at 199 (testimony of Peter Max). *See generally* Schaefer, *supra* note 65.

169. A price fixer or other antitrust violator cannot profit in a market in which demand is elastic. In such a market, by definition, substitute products become more attractive whenever the price of the principal product increases beyond a certain point.

170. Schaefer, *supra* note 65, at 897.

> markup were 10 percent, for each $1 that the conspiracy increases prices to general contractors, the State of Illinois would pay an extra $1.10.
>
> Additionally, because finished hardware components are essential parts of a building and represent a relatively small part of the total cost of a building, the demand for these components is very inelastic, i.e., the volume of purchases are [sic] not affected by price. When demand is very inelastic, increases in costs due to an overcharge will be passed on in full.[171]

In the *Gypsum* cases, the district court noted a similar result:

> Total demand for gypsum wallboard is not materially influenced by changes in the current price of gypsum wallboard since the cost of wallboard is a relatively small element in the total cost of a residential or commercial structure. The cost of gypsum wallboard used in the construction of an average sized house calculated at approximate 1969 published prices in the San Francisco Bay Area is $382. This compares with the total estimated construction cost of an average house for 1968 of $18,000 (not including the cost of the land, builder's profit or financing cost). Otherwise stated, the cost of wallboard amounts to only about 2 per cent of the total construction of a typical house. As a consequence, the demand for such wallboard is inelastic to price and even substantial changes in gypsum wallboard prices are not likely to change the quantity consumed.[172]

It is thus imperative that the Congress structure a statute that would facilitate the assertion of claims by indirect purchasers. It is not sufficient to assert, as the Supreme Court did in *Illinois Brick*, that courts cannot reconstruct in the courtroom the features of a perfectly competitive market.[173] Similar objections could be directed at the approach taken in most antitrust treble damage actions. Nevertheless, in the past the Court has surmounted such obstacles in order to promote the dual goals of the treble damage action.[174]

The legacy of Supreme Court decisions establishing proof requirements for the plaintiff in treble damage actions should form the basis for an approach that would permit each plaintiff in the chain of manufacture or distribution to present the best possible evidence in its possession.[175] The desideratum must be to permit the trial court to survey the market structure in the particular case before it; the boundaries of the inquiry should be the individual court's perception of the strain on the judicial

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171. *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. ¶ 74,680 at 94,981 (D. Conn. 1973) (*quoting* affidavit of William F. Mueller).

172. Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295, 300 (N.D. Cal. 1971). Even the *Illinois Brick* majority admitted that "[f]irms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices." 431 U.S. at 744. That the majority continued, adding that "[t]hese rules are not adhered to rigidly" and that "the extent of the markup (or the allocation of costs) is varied to reflect market conditions" does not destroy the utility of the initial statement.

173. 431 U.S. at 741-45.

174. *See* Section III(B) *supra.*

175. When trials have been consolidated or parties have intervened, each plaintiff's information and records would be available to the entire group, thus creating an adversarial environment among the plaintiffs that would generally aid the court to acquire the needed evidence to reach a considered judgment.

system as well as its recognition that not every person who has suffered a minor injury can be permitted to recover.

A court's apportionment of the damages among the plaintiffs will undoubtedly be imprecise. At the same time, it must be emphasized that the trebling feature of the section 4 action compensates to an extent for that imprecision.[176] An approach such as that suggested here would therefore permit the courts to make a reasonable estimate of the pecuniary loss suffered by each member of the chain. Some have criticized the treble damage action, contending that jural fears of awarding a windfall can lead to a refusal to disgorge the whole of the defendant's illegal profit.[177] This fear may disappear, at least in chain of distribution cases, when the jury knows that its verdict will be apportioned in a more equitable manner.

2. *S. 1874, H.R. 11942*

The House committees have shown greater creativity in developing a solution to the damages problem than have the Senate committees. Even though innovative and constructive suggestions were made in the Senate hearings on S. 1874,[178] the resulting Senate bill contains no substantive provisions that would overcome the concerns of the Supreme Court and guide the judicial efforts to measure damages.

The House committees have also not been receptive to all the innovative suggestions made during the hearings.[179] Nevertheless, the resulting

176. Phillip Areeda commented in his testimony before the House Monopolies Subcommittee that "there is too much concern about relentlessly trying to recover every penny that the defendant may have gained from his wrongdoing. Trebling makes up for missing some damages here." *House Hearings* at 79-80.

177. *See* Note, *supra* note 102, at 1569. After the offensive pass-on theories asserted in the homeowner and public bodies actions in *Mangano* had been rejected on the basis of *Hanover Shoe, see* notes 73-78 and accompanying text *supra*, the district court approved a settlement of the class action that had been brought by various contractors. Philadelphia Hous. Auth. v. American Radiator and Standard Sanitary Corp., 322 F. Supp. 834 (E.D. Pa. 1971). Affirming this settlement on appeal in the face of contentions that the settlement was insufficient, the Third Circuit noted that "the claims of this class were minimized by the probability that overcharges made upon them were passed on to their customers." Ace Heating and Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). Thus, the indirect purchasers were precluded from maintaining actions while the direct purchasers were chastized for being too greedy in their requests. A direct-purchaser-only rule would perpetuate this attitude. Defendants will be understandably irritated in having to settle with plaintiffs who were not injured, juries will be reluctant to force defendants to disgorge the full overcharge, and courts are likely to take the attitude of the Third Circuit.

178. For example, Richard Turner, the attorney general for the State of Iowa suggested at the Senate hearings that the legislation might create a presumption that the overcharge has been passed on to the last purchaser in the chain, rebuttable only by a preponderance of the evidence. *Senate Hearings* at 105. *See* Note, *supra* note 64, at 984. The assumption in Turner's suggestion that an overcharge is passed down the chain reflects the concepts developed earlier concerning the types of markets in which pass-on is likely to occur. *See* Section II(A) *supra*.

179. The staff of the House Monopolies Subcommittee at one point suggested that the procedure at the damages stage of the action might be facilitated by the adoption of an initial evidential presumption that each plaintiff was injured equally; thereafter, the court could shift the percentages upon consideration of the evidence. 846 ANTITRUST & TRADE REG. REP. (BNA) A-4 (January 12, 1978). It is debatable, however, whether this technique should be adopted at the outset of the consideration of damages since the evidential presumption would destroy to an extent the clean slate with which the court should approach the issues. A more satisfactory possibility would be to reserve the staff's suggestions, permitting a court to apply it in its discretion as a last resort.

bill does contain at least one useful provision to aid the federal judiciary at the damages stage. Section 2 of the House bill would permit proof of damages on a class-wide basis in class actions and *parens patriae* actions; the percentage of the total damages thus collected by a member of the class would equal the ratio of the member's purchases or sales to the purchases or sales of the class as a whole.[180] This approach should not be subject to the constitutional objections that have befallen fluid relief[181] and that now threaten the creativity of the *parens patriae* device.[182] Some courts and writers have found these devices objectionable because they permit recovery by plaintiffs who have not appeared in court to prove individual damages. In contradistinction, under the House bill, each plaintiff would still be required to appear in court to prove damage to itself, albeit by documenting its purchases.[183]

One additional provision in the House bill that affects damage calculation deserves mention: Indirect purchasers may recover only for the initial overcharge exacted by the defendant from the direct purchaser. Subsequent boosts in the price of a product within the chain provoked by the defendant's illegal overcharge are not recoverable. This provision would be important, for example, when a member of the chain sets its selling price as a percentage of cost. In that case, the illegal overcharge becomes incorporated into the member's cost and yields both additional profit for the member and additional cost for purchasers down the chain. Under the House bill, the additional cost to subsequent purchasers, even though proximately caused by the initial overcharge, could not be recovered.

This limitation on recovery has a further effect, perhaps unnoticed by the House drafters.[184] It was earlier mentioned in this Note[185] that, despite its ability to pass on part of the overcharge, a member of a chain may have

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180. *See* note 61 *supra*. The House Report states that the purpose of this provision was to approve the approach already taken by some circuits with respect to class actions in general.

181. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

182. *See* Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 730 (1977).

183. Some courts have accorded de facto recognition to the legitimacy of the House bill's approach by permitting the threshold requirement of the fact of some damage to a class member to be proved in class actions by demonstrating the generalized fact of some damage to the class. *See In re* Sugar Indus. Antitrust Litigation, 1977-1 TRADE CAS. ¶ 61,373 at 71,336-37 (N.D. Cal. 1977); *In re* Master Key Antitrust Litigation, 1975-2 TRADE CAS. ¶ 60,648 (2d Cir. 1975); The *Master Key* court wrote:

> If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee.

Id. at 94,981 n.11.

184. The purpose of the provision, according to the House Report, was to cover those cases discussed in the text above that involve percentage-of-cost contracts. HOUSE REPORT at 16.

185. *See* note 66 and accompanying text *supra*.

lost profits on additional sales it could have made but for the higher prices that a defendant's illegal activity forced it to charge. The House provision would apparently preclude a purchaser from recovering these lost profits.[186] This writer views this feature of the House bill as a necessary compromise that places realistic limits upon the inquiries required of a court.

D. *The Problem of Multiple Liability: Should* Hanover Shoe *Be Reversed?*

An important question remains to be considered: What should be the proper role of the *Hanover Shoe* doctrine?[187] Even some who argue in favor of the indirect purchaser suit admit that a rule that permits offensive but not defensive pass-on threatens the defendant with serious risks of multiple liability.[188] Unfortunately, legislation that overrules both *Illinois Brick* and *Hanover Shoe* would permit the defendant to play a shell game with the various purchasers in the chain. Such an approach could ultimately permit an adjudicated monopolist to retain a substantial portion of its ill-gotten gain. It is crucial, therefore, that *Hanover Shoe* be retained. If the Congress is convinced that any anti-*Illinois Brick* legislation must perforce overrule *Hanover Shoe*, this writer would urge that the Congress not overrule *Illinois Brick*.[189] There is, however, another alternative. The following portion of this Note attempts to demonstrate

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186. A court faced with the contention that a plaintiff should be able to recover those lost profits could independently reach the results advocated in the House bill as a matter of remoteness under an antitrust standing theory.

187. *Hanover Shoe* is discussed in Section I(A)(1) *supra*.

188. *Senate Hearings* at 53 (testimony of Eleanor Fox); *House Hearings* at 15 (testimony of John H. Shenefield).

In his oral testimony before the House Subcommittee on Monopolies and Commercial Law, Phillip Areeda indicated one reason why the concern about the prospects of multiple liability was legitimate:

> It has been suggested that multiple recoveries have never occurred and are therefore not really a problem. But I do not take much comfort from that for the following reasons: Only in recent years have the class action techniques, or mounting consumer actions been refined. And the *parens patriae* vehicle for bringing consumer actions, perhaps a rather effective vehicle, is also quite new. At the same time, there is a growing inclination among businesses themselves to invoke the antitrust laws as plaintiffs. This indicates an increasing likelihood of middlemen suing, at the same time that the techniques for major actions on behalf of consumers have become more effective.
>
> That there hasn't been a duplicate recovery problem in prior history of the Sherman Act thus is not altogether reassuring that there won't be one in the future.

House Hearings at 78.

189. Perry Goldberg testified at the Senate Committee's 1978 hearings that *Hanover Shoe* must be retained:

> I have to say that the important thing to me is *Hanover Shoe*. *Illinois Brick* is something that appeals to my heart in the sense that I am opposed to *Illinois Brick* because there is something wrong with not allowing a person who has been hurt to collect in the courts.
>
> But if I have to choose between my heart and my head, in this case, I will take my head. My head is *Hanover Shoe*. *Hanover Shoe* says: "we are going to get antitrust enforcement" *Illinois Brick* says: "The wrong guy may collect."

Testimony of Perry Goldberg before the Senate Committee on the Judiciary, April 21, 1978, cited in SENATE REPORT at 6.

that it is possible for the Congress simultaneously to avoid the risks of multiple liability,[190] retain the salutary results of *Hanover Shoe*, and overturn *Illinois Brick*.

1. *The Difficulty of Permitting Defensive Pass-on: The Attempted Solutions in S. 1874 and H.R. 11942*

Both S. 1874 and H.R. 11942 would provide a limited overruling of *Hanover Shoe*, although the circumstances under which each bill would permit the assertion of a pass-on defense are different. An examination of the two proposed solutions demonstrates the abuse that could occur even with a limited overruling of *Hanover Shoe*.

The Senate bill would allow a defendant to demonstrate that a plaintiff had passed on the overcharge to any party that is itself *entitled* to recover treble damages under the antitrust laws.[191] The Senate report explained the bill's approach: "[T]he pass-on defense cannot be used where the overcharge was passed on to persons who themselves would be denied recovery under either the doctrines of proximate cause or target area, . . . or legal bars to recovery."[192] The Senate Committee intends that the judiciary permit the assertion of the pass-on defense "only where it does not inhibit the private enforcement of the antitrust laws or create a hiatus in enforcement."[193]

The House version of the anti-*Illinois Brick* legislation, on the other hand, uses the "in the chain" concept that it developed for the standing portion of the bill. H.R. 11942 would permit the defendant to demonstrate that a plaintiff had passed on the overcharge to another seller or purchaser "in the chain."[194] Apparently, the same inquiries that a court would make to determine whether an indirect purchaser could sue for treble damages would be made once again at the damages stage of the trial to determine whether—and to whom—a defendant could demonstrate pass-on.

The bills differ in at least two significant ways. This Note earlier indicated that the Senate bill would fail to provide the judiciary with realistic advice about how the number of indirect purchasers might be pared; presumably courts were to apply their traditional standing tests.[195]

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190. It is incorrect to argue that defendants must have the benefit of *Hanover Shoe* to the extent that plaintiffs have the benefit of *Illinois Brick*. The plaintiff is the innocent victim of anticompetitive conduct, while the defendant, at the damages stage of the proceedings, has already been adjudged guilty of violating the antitrust laws. The proper question is whether the defendant faces the risk that it will be forced to pay more than once for the same overcharge.

191. S. 1874, § 3. *See* note 58 *supra*.

192. SENATE REPORT at 6.

193. *Id.*

194. H.R. 11942, § 2. *See* note 61 *supra*. The House bill would permit any subsequent plaintiff to take advantage of this situation by collaterally estopping the defendant on any issues relating to the amount of damages passed on.

195. *See* notes 88-89 and accompanying text *supra*.

The House bill, on the other hand, would create a new standing concept to be applied in the pass-on cases.[196] Therefore, to the extent that H.R. 11942 would require a court to develop for pass-on cases a test that deviates from its usual standing test, the two bills would differ in the extent to which *Hanover Shoe* would be abrogated. The second difference concerns the extent to which legal bars to recovery that face a potential plaintiff would affect the ability to assert a pass-on defense. S. 1874 does not permit the assertion of a pass-on defense when the person allegedly the recipient of the pass-on is otherwise legally barred from bringing suit. In contrast, the House bill would not permit the court to determine whether the person allegedly the recipient of the overcharge is legally barred from bringing suit (for example, by the statute of limitations) before it permitted the assertion of defensive pass-on.

An examination of the lengthy excerpt from *Hanover Shoe* cited earlier in this Note[197] indicating the policy reasons for the Supreme Court's rejection of the pass-on defense illustrates the havoc that even a limited overruling of *Hanover Shoe* would wreak. The shell game that would undoubtedly result in practice would take on new dimensions since the defendant would be injecting standing inquiries into the damages stage of an action. Essentially, these portions of S. 1874 and H.R. 11942 would permit the defendant to demonstrate to the court policy reasons why a purchaser other than the plaintiff should be considered "in the chain" or "entitled to sue." Yet it is peculiarly inappropriate to permit a violator of the antitrust laws to aid the court to develop standing policies that might be *stare decisis* in subsequent actions. The possibility exists that a defendant's arguments will be tainted by its interest in defining a standing doctrine that would encompass only those plaintiffs unlikely to present the threat of a suit against it.

This writer believes that other provisions in the House bill, especially when considered in conjunction with existing procedural devices, sufficiently protect defendants from the risk of multiple liability; the congressional committees disagree.[198] Consequently, this writer suggests a method that should allay the congressional concerns, and nevertheless permit the legislative overturning of *Illinois Brick*.

The suggested approach would be to create, in essence, a new statute of limitations. The Congress could create authority for the courts to require the assertion by members of the chain of all claims against an antitrust violator within a specified period of time after a suit is commenced by one of the purchasers; the claims could be asserted in the same court using Rule 24 intervention[199] or as new actions in separate courts.[200]

196. *See* note 61 *supra*.

197. *See* note 114 *supra*.

198. SENATE REPORT at 6; HOUSE REPORT at 20.

199. FED. R. CIV. P. 24.

200. Cases in different districts could thereafter be consolidated in one district for pretrial

Persons not appearing within the prescribed period would be barred from subsequently commencing their own actions. The technique could be implemented simply, using newspaper notice or perhaps notice in trade journals. Unfortunately, this approach might possibly foreclose plaintiffs whose actions did not arise until after the statutory period had run because their purchases had not yet occurred.[201] It is more important, however, to draft legislation that would retain *Hanover Shoe* and simultaneously repudiate *Illinois Brick*.

V. CONCLUSION

The remedial function of section 4 of the Clayton Act requires that plaintiffs injured by antitrust violations have access to the courts. In the past, the access provided by Congress in section 4 had, it was believed, included the right of plaintiffs indirectly injured by price-fixing violations or other monopolistic conduct to maintain actions. One salutary effect of this right was that it furthered the deterrent function of section 4. The *Illinois Brick* Court's construction of the "injury" requirement to exclude the purchaser indirectly injured in a chain of manufacture or distribution thus not only forecloses what is often the sole opportunity of the indirect purchaser to recover its pecuniary loss, but also works a major retreat in antitrust enforcement.

As the congressional committees that are currently drafting anti-*Illinois Brick* legislation have discovered, however, simple overruling of the decision would fail to resolve the difficulties identified by the Supreme Court. The arguments of the Court can only be rebutted if care is taken to articulate the problems at issue and weigh the legitimate interests of both direct and indirect purchasers.

In support of that task, this Note has attempted to untangle the various strands of law that comprise the knot of pass-on. It has indicated the special need for Congress to school itself in the policies and law of antitrust standing as it endeavors to define those indirect purchasers who should be able to sue. Finally, this Note has suggested that, to provide a method for calculating the damages of each member of the assembled

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proceedings utilizing the Multidistrict Litigation Act. 28 U.S.C. § 1407 (1970 & Supp. V 1976). While such transfers are ostensibly permitted only for discovery and other pretrial proceedings, 28 U.S.C. § 1404 can sometimes be relied upon to retain the action in that district. Statutory revision of 28 U.S.C. § 1407 to permit this procedure as a matter of course has been urged in Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974).

Section 4 of H.R. 11942 would amend the Multidistrict Act to permit the trial consolidation of any civil action brought under the Clayton Act. *See* note 61 *supra*. The Hart-Scott-Rodino Antitrust Improvements Act authorizes this procedure for *parens patriae* actions. Pub. L. 94-435, § 303, 90 Stat. 1396, 28 U.S.C.A. § 1407(h) (1970 & Supp. 1978). The House bill, therefore, would merely extend this treatment to § 4 private actions and § 4A actions by the United States.

201. Judge Harold R. Tyler, former district court judge and former Deputy Attorney General of the United States, testified that a member of the chain might not even receive a good or product that has been the subject of an antitrust violation until after a suit has been commenced higher up the chain. *House Hearings* at 160-61.

group, Congress should hearken back to the policies of the *Bigelow* decision and adopt an approach that would ease the burden that the antitrust plaintiff faces.

The anti-*Illinois Brick* legislation seems likely to reach the floor of both Houses in early 1979.[202] Close congressional examination of the measures are necessary if the solutions suggested in S. 1874 and H.R. 11942 are to succeed.

Thomas Demitrack

202. A threatened filibuster by Senator Orrin G. Hatch kept S. 1874 from the Senate floor at the close of the 95th Congress. 882 ANTITRUST & TRADE REG. REP. (BNA) A-21 (September 28, 1978).

After the close of the session, congressional staffers both in the Senate and House Committees indicated that new anti-*Illinois Brick* legislation was being considered. 887 ANTITRUST & TRADE REG. REP. (BNA) A-13 (November 2, 1978).